UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TEN

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CASE NO. 10-CA-197586
10-CA-197588
10-CA-203636
10-CA-210623

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SYSCO COLUMBIA, LLC,

Employer,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 509

Petitioner.

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**POST-HEARING BRIEF OF SYSCO COLUMBIA, LLC**

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Page(s)**

**Internet Citations**



**Other Authorities**

## I. STATEMENT OF CASE

These cases relate to two representation petitions filed regarding two separate groups of employees at Sysco Columbia LLC ("Sysco Columbia," "Respondent," or the "Company"), the Drivers petition (covering Delivery Drivers, Shuttle Drivers, and Specialty Drivers in Sysco Columbia's Transportation department) and the Fleet Maintenance petition (covering Mechanics and Spotters in Sysco Columbia's Fleet Maintenance department).

### A. The Drivers Petition

On March 15, 2017, in NLRB Case No. 10-RC-194843, Teamsters Local 509 ("Teamsters" or the "Union") filed a petition for a certification election among drivers employed by Sysco Columbia. The Region ordered a mixed manual and mail ballot election for the drivers. Employees began voting by mail ballot on April 13, 2017. The manual ballots were cast on April 14, 2017. On April 26, 2017, just one day before the mail ballot return deadline; two weeks after the manual ballots had been cast, the Teamsters filed an unfair labor practice charge (No. 10-CA-197586) which Region 10 allowed to block the ballot count. Since then, Case No. 10-RC-194843 remains open but the results of the election remain unknown because the drivers' ballots are impounded. The Union has filed two charges applicable only to the Drivers Petition.

#### i. Case 10-CA-197586

In case 10-CA-197586, the union initially claimed Sysco Columbia violated the National Labor Relations Act ("Act"), claiming eight separate allegations.[1]

[1] Specifically, this charge alleged Sysco Columbia violated the Act by: (1) Granting employees improved wages, benefits, and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union; (2) Interrogating employees about their union membership, activities, sympathies, and protected concerted activities and the union membership, activities, sympathies, and protected concerted activities of other employees; (3) Informing employees that it would be futile for them to select the Union as their collective bargaining representative; (4) Threatening employees with a loss of wages, benefits and/or terms and conditions of employment in an effort to discourage employees from supporting the Union; (5) Soliciting employee grievances and implied unspecified remedies to their grievances in an effort to discourage employees from selecting the Union as their collective bargaining representative; (6) Creating the impression that their union and protected concerted activities were under

On August 9, 2017, the Union filed the first amended charge, withdrawing six out of the eight original allegations. The allegations that remained were:

(1) Threatening employees with the inevitability of strikes in an effort to discourage employees from supporting the union.

(2) Soliciting employee grievances and implied unspecified remedies to their grievances in an effort to discourage employees from selecting the Union as their collective bargaining representative.

On October 2, 2017, the Union filed its second amended charge, leaving just one vague and overly broad allegation out of the original eight. The only allegation that remains in this case is:

- "The Employer violated the Act by soliciting employees' grievances and implied unspecified remedies to their grievances in an effort to discourage employees from supporting the Union."

**ii. Case 10-CA-203636**

On April 26, 2017, the Union filed 10-CA-203636, containing nine alleged violations of the Act.[2]

surveillance; (7) Threatening employees with the inevitability of strikes in an effort to discourage employees from supporting the union; and (8)Polling employees as to how they were going to vote in the upcoming election for representation.

[2] The charge alleged that Sysco Columbia violated the Act by: (1) Granting employees improved wages, benefits and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union, specifically (a) Transportation Supervisor Travis Cook gave employees white and green "Sysco Operations" hats after a captive-audience "drivers" meeting that was held at the Comfort Inn in Bluffton, South Carolina in March 2017; (b) Transportation Supervisor Travis Cook gave employees "Columbia Operations" hat after captive-audience "drivers" meeting at Hampton Inn in around Hardeeville, SC in March or April 2017; (c) Sysco Columbia, at its Columbia, South Carolina facility, placed a box of free hats for employees to take in March and/or April 2017; (d) Creating lead drivers positions at its Charleston, Greenville, and Hilton Head, South Carolina domiciles during the period of January and March 2017; (e.) Operations Vice-President Michael Turner paid for the food for a catered event at the Carolina Ale House in Columbia, South Carolina that was held in or around March or April 2017; and (f) Granting employees at its Greenville, SC domicile better wages; (2) Promoting employees to lead drivers and Transportation Supervisors to induce employees to reject the Union during the period of January and April 2017; (3) Denying the Union access and/or continued access to its Greenville, South Carolina domicile in order to discourage and dissuade employees support for the Union on about April 13, 2017; and (4) Informing employees, via DVD, that their wages and benefits would be frozen if the Union was selected to represent them.

On October 2, 2017, the Union filed the first amended charge, withdrawing the first eight allegations; leaving just one. The only allegation that remains in this case is:

- Within the past six (6) months, the Employer has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by informing employees that their wages and benefits would be frozen if the Union was selected to represent them.

### B. The Fleet Maintenance Petition

The Teamsters filed a representation petition covering Sysco Columbia's fleet mechanics and spotters on March 29, 2017 (Case No. 10-RC-195759). The election was scheduled for April 27, 2017. Here too, the Teamsters filed an unfair labor practice charge on the eve of the election, effectively blocking voting (Case No. 10-CA-197588). The case remains open, pending the resolution of the union's charges. The Union has filed two charges applicable only to the Fleet Maintenance petition.

#### i. Case 10-CA-197588

In case 10-CA-197588, the Union initially claimed Sysco Columbia violated the Act by:

1. Granting employees improved wages, benefits and/or improved terms and conditions of employment in an effort to discourage employees from supporting the union.

2. Interrogating employees about their Union membership, activities, sympathies, and protected concerted activities of other employees.

3. Threatening employees with a loss of wages, benefits and/or terms and conditions of employment in an effort to discourage employees from supporting the Union.

On August 9, 2017, the Union filed its first amended charge. The Union maintained the first two allegations (1. granting employees improved wages and 2. interrogating employees) but replaced the third allegation – threatening employees with loss of wages – with the exact opposite, six allegations claiming that Sysco Columbia did not threaten loss of wages, but promised *increased* wages and other unspecified benefits.

### ii. Case 10-CA-203629

The Union filed charge 10-CA-203629 on August 3, 2017, initially claiming Sysco Columbia violated the Act by:

- Granting employees improved wages, benefits and/or improved terms and conditions of employment in an effort to discourage employees from supporting the Union.
- Promoting employees to induce employees to reject the Union.

10-CA-203629 was withdrawn in full on September 29, 2017.

## C. The Wage Memorandum (10-CA-207359 and 10-CA-210623)

There is only one charge that has not been withdrawn that is applicable to both the Drivers petition and the Fleet Maintenance petition. The Union filed 10-CA-207359 on October 4, 2017, claiming Sysco Columbia violated the Act by:

- Informing employees that they will not receive their annual pay raise due to the Union's pending unfair labor practice charges in order to discourage union activities or membership.

10-CA-207359 was withdrawn in full on November 9, 2017.

The union filed 10-CA-210623 on November 29, 2017 claiming that Sysco Columbia violated the Act by:

- Informing employees that they would not be receiving their annual wage adjustment while the Union's petitions and unfair labor practice charges were pending.

## D. Region's Consolidation of Cases

On October 27, 2017, the Region issued a Consolidated Complaint. Case Nos. 10-CA-197586 and 10-CA-197588 were originally consolidated with another charge (No. 10-CA-203636) and were set to be heard on February 26, 2017. Cases 10-CA-197586, 10-CA-197588, 10-CA-203636, 10-CA-210623 were later consolidated and set for a hearing to commence on March 12,

2018.[3] A hearing was held to address the merits of the Amended Consolidated Complaint ("Complaint") from March 12 through March 16, 2018; from May 21 through May 24; and concluded on June 1, 2018.[4]

## II. ISSUES

The Complaint alleges Sysco Columbia "has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." (Complaint, ¶ 13.) The Complaint also alleges Sysco Columbia "has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act." (Complaint, ¶ 14.) The specific issues to be determined by the Judge are as follows:

(1) Has the General Counsel ("GC") established by a preponderance of the evidence that Sysco Columbia, by Michael Brawner, promised its employees increased benefits and improved terms and conditions of employment if they rejected the union by soliciting employee complaints and grievances? (Complaint, ¶ 7.)

(2) Has the GC established by a preponderance of the evidence that Sysco Columbia, by James Fix, (i) told employees that Sysco Columbia would grant them wage increases sooner if they voted against Union representation; (ii) promised its employees increased benefits and improved terms and conditions of employment if employees rejected the Union, by soliciting employee complaints and grievances; (iii) blamed the Union for employees not getting wage increases; (iv) granted benefits to its employees by allowing employees to start parking closer to their work areas; (v) interrogated employees about the impact of Sysco Columbia's promises to gauge employees' level of support for the Union; (vi) suggested that employees rescind the election process; and (vii) threatened that if the Union were voted in pay would be frozen? (Complaint, ¶ 8(a)-(c).)

[3] At the hearing, Respondent moved to sever the cases regarding the drivers from the cases involving the mechanics. So that it could pursue a settlement of the charges related to the mechanics. The General Counsel opposed Respondent's motion and the Administrative Law Judge denied the motion.

[4] At trial, Counsel for Sysco Columbia objected to a number of questions and lines of inquiry by Counsel for the General Counsel. In many instances, those objections were overruled. Sysco Columbia maintains all objections it raised at trial, other than objections that were expressly withdrawn, and contends the Judge should not rely on any evidence adduced through questions to which Sysco Columbia objected at trial.

(3) Has the GC established by a preponderance of the evidence that Sysco Columbia, by DVD, threatened employees that their wages would remain frozen during negotiations if they chose the Union to represent them? (Complaint, ¶ 9.)

(4) Has the GC established by a preponderance of the evidence that Sysco Columbia, by a letter from Almetrice "Kema" Weldon and Michael Turner unlawfully, informed employees that they would not receive a planned September wage adjustment because the Union filed representation petitions and unfair labor practice charges? (Complaint, ¶ 10.)

(5) Has the GC established by a preponderance of the evidence that Sysco Columbia decreased the benefits of its employees by withholding a September wage adjustment? (Complaint, ¶ 11.)

## III. SUMMARY OF ARGUMENTS

The General Counsel ("GC") has failed to establish any violation of the Act. First, the allegations regarding Mike Brawner, Sysco Corporation's Southeast Market President, fail because Brawner was not an employee of Sysco Columbia and did not have the authority to effect the promises he is alleged to have made. Second, Brawner's alleged comments were, at most, "generalized expressions of [his] desire to make things better," which have long been held to be lawful under the Act. Because Brawner never made an explicit or implicit promise of improvements to employees' wages or other terms and conditions of employment, the GC's allegations fail to establish a violation of the Act. Finally, even if Brawner had solicited grievances, which Sysco Columbia denies, such solicitation would not violate the Act because Sysco has an extensive past practice of soliciting grievances, through a number of mechanisms.

The GC has also failed to establish that Jim Fix committed any violation of the Act. First, Fix was not a 2(11) supervisor or a 2 (3) agent, but rather a "supervisor-in-training," at the time the comments are alleged to have been made. Second, the testimony offered against Fix was not credible. The GC's primary witnesses in support of the allegations involving Fix either fabricated evidence or admitted to "tuning out" the meetings in which Fix was alleged to have violated the

Act. Fix, on the other hand, credibly denied the allegedly unlawful acts and readily admitted to changing employees' parking, which was not an unlawful conferral of a benefit under the Act.

The GC's allegations regarding the DVD distributed by Sysco Columbia fail because the language of the DVD did not violate the Act. While the Complaint alleges Sysco Columbia threatened to "freeze" wages during negotiations, this is contradicted by the actual language of the DVD, which said wages would be "frozen at the status quo" during negotiations, an accurate statement of the law. The Board has upheld similar language in a number of cases. Sysco Columbia repeatedly – and accurately – communicated to employees that wages could go up or down through negotiations and that Sysco Columbia could not unilaterally grant discretionary wage increases during bargaining.

Finally, the GC's allegations regarding the September 2017 memorandum to employees about wage increases – and the alleged "withholding" of a September 2017 wage increase – are entirely without merit. No "standard" September wage increase existed, as wage increases vary widely from year to year in timing and amount. Contrary to the GC's assertions, Sysco Columbia actually maintained the status quo for employees covered by the Union's two petitions, and made wage adjustments that were not subject to the discretionary process. Finally, the GC's allegations fail because the September 2017 memorandum properly explained the law and Sysco Columbia's actions and intent.

## IV. STATEMENT OF FACTS

### A. Sysco Columbia, LLC

Sysco Columbia is a broadline food distributor that delivers food and food related products to restaurants, schools, and anywhere people enjoy meals away from home, throughout South Carolina and portions of western Georgia. (Tr. 37-39.) Sysco Columbia is headquartered in Columbia, South Carolina. (Tr. 37:24-25.)

Sysco Columbia maintains its warehouse operation and shuttle and delivery fleet at its Columbia, South Carolina facility. (Tr. 40:18-23.) To make deliveries close to Columbia, Sysco Columbia dispatches delivery drivers directly from its Columbia warehouse. To cover the rest of its territory, Sysco Columbia uses shuttle drivers to deliver loaded trailers from its Columbia warehouse to "domicile yards" located in Greenville, Hilton Head, Myrtle Beach, Florence, or Charleston, South Carolina, or Augusta, Georgia, where more delivery drivers are stationed to pick up the trailers and deliver their contents to Sysco Columbia's customers. (Tr. 56:7-18.)[5]

During the organizational campaigns at the heart of these cases, Troy Barnes was the President of the Company. (Tr. 727:10-15.) Tom Propps is the current President of the Company. (Tr. 44:20-25.) All Sysco Columbia executives report to the Sysco Columbia President, including, relevant to these cases, Vice President of Operations, Michael Turner, and Human Resources Business Partner, Almetrice "Kema" Weldon. As Vice President of Operations, Turner oversees all transportation, fleet, and warehouse functions; and all drivers, mechanics, spotters, and their supervisors, relevant to these cases. Turner oversees Transportation Director, Bo Nash, who manages the petitioned-for drivers. And Turner oversees Fleet Manager Jim Fix, who manages the petitioned-for mechanics[6] and spotters.[7] (J. Ex. 1.) Sysco Columbia's President is completely responsible for day-to-day operations at Sysco Columbia. (Tr. 803:21-804:23.) Sysco Columbia's Transportation Department and Marketing Department are separately managed and physically separate. (J. Ex. 1, 3(a)(b).)

[5] The allegations of alleged unlawful acts during the driver election involved only the Columbia, Hilton Head, and Charleston operations (not Greenville, Myrtle Beach, Florence, or Augusta locations).
[6] "Fleet Technicians" on the organizational chart.
[7] "Maintenance Utility Worker Technicians" on the organizational chart.

### B. The Driver Education Campaign

Around early February 2017, Sysco Columbia learned that the Teamsters were attempting to unionize Sysco Columbia drivers. (*See* GC Ex. 19.) In response, Sysco Columbia launched an employee education campaign designed to share facts with drivers about the Teamsters, the realities of unionization and collective bargaining, and the ways in which being unionized could affect employees. (*See* R. Exs. 4, 5, 6, 42; Tr. 1189:2-14.)

From the start, Sysco Columbia's education campaign was designed with safeguards in place to ensure the Company did not violate the law. Sysco Columbia retained two trained labor consultants, Ronn English and Peter List of Kulture Consulting, to: (1) educate Sysco Columbia's management team on how to lawfully communicate with employees and (2) educate employees about the NLRA, collective bargaining, and other issues related to unionization. (Tr. 564:16-566:2, 598:23-599:15.) Sysco Columbia retained legal counsel to advise the entire management team and ensure the legal sufficiency of the Company's actions in communications. (Tr. 735:13-19)

As part of its education campaign, Sysco Columbia held a number of group meetings with drivers. All the group meetings held by Sysco Columbia during the campaign were scripted, and those scripts were reviewed ahead of time by Sysco Columbia's labor counsel to ensure compliance with the Act. (Tr. 566:24-567:4, 568:4-15, 591:18-24, 735:6-20, 836:17-837:5.)[8] As an additional safeguard, either Ronn English or Peter List presented and was present at each group meeting to ensure the speakers did not unlawfully deviate from the script and to help management lawfully answer any questions employees raised at such meetings. (Tr. at 599:12-21, 813:8-13.) To ensure that Sysco Columbia's message was not misconstrued, English and List routinely showed employees a slide at the beginning of their presentation that reads:

[8] The GC acknowledged to the ALJ at the hearing that the GC does not challenge the scripted comments of any of the meetings. (Tr. 871:22-25.)

> **The purpose of this presentation is a follow-on discussion about information regarding the Teamsters' rules as they may relate to you as potentially-unionized workers.**
>
> **NO ONE CAN PREDICT future events…**
>
> **Therefore, no predictions will be made about what will happen if you become represented by the Teamsters.**
>
> **This is a discussion of FACTS and the LAW, as well as what CAN or MAY happen, NOT what WILL happen.**

(R. Ex. 5 at 15; Tr. 862:18-19, 1074:9-14, 1112:14-24.)

Sysco Columbia began holding meetings with drivers in early February 2017. The first meetings were led by Troy Barnes and Mike Turner between February 6 and 9, 2017, at Sysco Columbia's headquarters and all outlying domicile yards. (GC Ex. 19; Tr. 641:6-643:13.) As with all meetings held by Sysco Columbia during the campaign, Barnes and Turner's comments were scripted. *Id.* One of the GC's witnesses testified he remembered Troy Barnes reading directly from the script in this meeting and telling employees "he wanted to make sure that he was saying what he needed to say…because there were certain legal things he could and couldn't say." (Tr. 116:4-10, 154:20-23.)

After the drivers' petition was filed, Sysco Columbia held four additional rounds of driver meetings during the campaign, each with a different weekly topic, as well as a "25th hour" meeting shortly before the drivers' in-person vote. (*See* GC Ex. 17, Sign-in sheets reflecting meetings for drivers the weeks of March 13, March 20, March 27, and April 4; R. Ex. 6, April 10, 2017 Script for 25th Hour Roundtable; Tr. 567:19-21.)[9] For example, the first week of post-petition meetings (the week of March 13, 2017) discussed collective bargaining. (Tr. 569:21-23, 571:2-7; R. Ex. 4.)

[9] The GC asked several witnesses whether the group meetings were mandatory. While it is not unlawful to hold mandatory meetings, Sysco Columbia notes that multiple witnesses testified they missed group meetings and were not disciplined. (Tr. 211:13-15, 323:25-324:4, 843:25-844:2). The GC did not introduce any evidence of any employee being disciplined for missing a meeting.

The second week of post-petition meetings (the week of March 20, 2017) discussed pension plans and the Union's constitution. (Tr. 581:1-3; R. Ex. 5.)[10]

Early in the campaign, Sysco Columbia asked Mike Brawner to speak to drivers as part of its education campaign. Though Brawner now works for Sysco Corporation[11], he worked at Sysco Columbia from 2002 until 2012. (Tr. 807:6-8.) Sysco Columbia asked Brawner to be involved in the response to the driver organizing campaigns because of his history working at Sysco Columbia, and because Sysco Columbia management did not have experience with union campaigns, collective bargaining negotiations, or contracts. (Tr. 807:16-808:9, 808:19-24.) Brawner had first-hand experience with these issues from the organizing campaign at Sysco Atlanta and Sysco Southeast Florida, and the eventual contracts at these locations, both of which were companies within his region. (Tr. 808:23-24.)

Brawner's involvement in group meetings was limited. (Tr. 810:21-22.) Brawner was only able to participate in some of the meetings because he had to attend to other Sysco Corporation business. (Tr. 810:10-22.) Of the post-petition meetings, Brawner spoke at two. (Tr. 730: 15-25.) Like the Sysco Columbia managers who spoke at meetings, Brawner relied on a script when he spoke. (Tr. 812:16-21, 818:8, 820:7-9.) In addition to the scripted message, Brawner used PowerPoint slides presented by English or List. (Tr. 503:14-16, 815:9-816:2.)

[10] For each round of meetings at the Columbia facility, multiple meetings were held so that all employees had the opportunity to attend. (Tr. 567:18-20.) Meetings were also held in all domiciles except the Florence Domicile. (Tr. 731:10-14.) Meetings for the Hilton Head drivers were held were held at the Holiday Inn Express in Hardeeville, South Carolina, and meetings for the Charleston drivers were held at the Crowne Plaza Hotel in North Charleston, South Carolina. (Tr. 202:17-20, 229:23-24, 257:25, 313:8.)

[11] Sysco Columbia is one of Sysco Corporation's independent subsidiary operating companies. (Tr. 802:4-13.) While Mike Brawner, as the Southeast Market President for Sysco Corporation, has some responsibility for Sysco Columbia, he does not have or exercise any control over day-to-day operations, hiring and firing, or wages and benefits at Sysco Columbia. (Tr. 803:21-804:23.) Brawner described his role as "looking across the enterprise for opportunities," discussing best business practices with operating company presidents, and acting as "a consultant when [operating company presidents] need something." (Tr. 804:16-17.)

Brawner was not present for the first weekly round of post-petition meetings. (Tr. 569:21-23, 571:2-7.) The first round of meetings where Brawner spoke was the *second* round of meetings, which occurred during the week of March 20, 2017, and in which he discussed the Atlanta collective bargaining agreement. (Tr. 581:1-582:3.) Brawner did not attend all of the second subject meetings. (Tr. 810:14-17.) During these meetings, Sysco Columbia played a video involving a Sysco driver from Atlanta, and showed a PowerPoint comparing Sysco Columbia's pay with the pay negotiated under the Atlanta contract. (268:3-18, 269:5-6.)

Brawner attended, and spoke at, all of the "25th hour" meetings, which occurred around April 10, 2017 a few days before the drivers' in-person vote, (Tr. 581:25-582:3; *see also* R. Ex. 6.) Weldon began each of the 25th hour meetings, and Brawner continued the presentation. (Tr. 589:23–590:8.)[12] Sysco Columbia also produced a lengthy DVD summarizing its campaign messages that was shown in the "25th Hour" meetings and mailed to employees' homes. (*See* GC Ex. 6 16:8-32:20.) The only statement in the DVD that the GC contends violates the Act is the following: "And even if you didn't pay dues or didn't support the union, your wages and benefits would still be frozen at the status quo, during the possible months or years of negotiations." (GC Ex. 6 23:15-18.) The GC's Complaint actually misstates this sentence of the video by omitting "at the status quo." (Complaint ¶ 9.)

In addition to holding group meetings among the drivers, Sysco Columbia management distributed flyers, posters, and other written materials to educate drivers during the campaign. (Tr. 1189:2-14, 1191:20-23.) Kema Weldon distributed these communications by putting them in the employee mailboxes at Sysco Columbia, mailing them to employees' homes, and hanging posters

[12] In addition to group meetings, several witnesses testified Brawner had one-on-one conversations with them, as discussed below. (Tr. 659:18-21, 681:18-682:6, 705:10-15). These alleged conversations occurred in open areas of Sysco Columbia's facilities and domicile yards, or in areas adjacent to employees' own working areas. Brawner also spoke to several employees over the phone, as discussed below.

in the Sysco Columbia facility. (Tr. 1189:7-14; R. Ex. 42.)[13] Among the topics about which Sysco Columbia communicated was the realities of collective bargaining, specifically that employees could end up with less, the same, or more through the collective bargaining process. (R. Ex. 42.)

### C. The Fleet Maintenance Campaign

Though the GC has attempted to lump the drivers petition (10-RC-194843) together with the mechanics and spotters petition (10-RC-195759), the two cases – and the two campaigns – are separate. The union filed the drivers' petition on March 15, 2017, at which point Sysco Columbia had already begun communicating with the drivers. It was not until March 29, 2017, that the union filed a petition for the mechanics and spotters. The Regional Director issued his Decision and Direction of Election on April 21. The election was scheduled for April 27 – only six days later (four business days).

Sysco Columbia's education campaign for the Fleet Maintenance employees involved significantly fewer group meetings for Fleet Maintenance employees.[14] Meetings occurred only on April 6 and April 19, 2017. (See GC 17 at 46-47.) No drivers attended these meetings. (Tr. 73:5-7.)

As with the drivers' campaign, Ronn English was present at the group meetings involving Sysco Columbia's fleet maintenance employees. (Tr. at 374:20-24.) Brawner attended only one meeting with Fleet Maintenance employees during their campaign, the "25th hour" meeting. (Tr. at 829:21-25.) At that meeting, Mike Turner and Ronn English also spoke, and a DVD produced

[13] The GC has not challenged the contents of any of the written campaign materials distributed by Sysco Columbia.

[14] While Mechanic Robert Anderson initially testified that Brawner attended four small group meetings and spoke at three or more (Tr. 451:12-19), he later acknowledged that his confidential witness affidavit said Anderson himself only attended two group meetings and Brawner was only in one. (Tr. at 499:23-500:15). Spotter, Carlos Nuttry, testified about one meeting where Brawner spoke. (Tr. 375:17-18). Neither Chris Bookert nor Josh Powell testified about any group meetings.

by Sysco Columbia specifically for the mechanics was played for the fleet maintenance employees. (Tr. 375:17-18; 457:7-9.)

Jim Fix, a 13-year mechanic at Sysco Columbia who had recently been promoted and was training for the Fleet Maintenance Supervisor position, did not speak for the Company at any group meeting. (Tr. 409:2-12.) Members of management who were leading the group meetings stood at the front, facing the employees, whereas Fix sat with the employees. (Tr. 840:12-841:3.) Despite being the sole subject of the ULP allegations during the mechanics campaign, Fix was not part of the Company's educational efforts and he was still in a supervisor-in-training role, as discussed in Section V.E., below.

### D. The September Memo and Sysco Columbia's History of Wage Adjustments

Since the blocking of the Drivers vote count and the Fleet Maintenance election in April 2017, Sysco Columbia has not granted any discretionary changes to wages or benefits, in accordance with the law. In September 2017, in response to questions raised by employees, Sysco Columbia issued a memorandum explaining the situation to employees. That memo stated in part that (a) "federal law requires that a company maintain wages and benefits at the status quo until the petition is resolved through an election, withdrawn by the union, or dismissed;" (b) "we cannot legally make any discretionary adjustments to wages until the union's petitions are resolved;" (c) "Teamsters' filing of unfair labor practice claims against the company effectively blocked the Driver and Mechanics elections;" and (d) "[t]here can be no changes to wages, benefits or other terms of employment while this process continues." (GC Ex. 3.)

### E. The History of Discretionary Wage Adjustments at Sysco Columbia

Discretionary wage adjustments at Sysco Columbia are determined on the performance of the Company, market relevant data based on surveys prepared by third parties, changes to the scope of particular positions, and operational changes affecting the employees (such as the implementation of new technology). (Tr. 976:22 – 978:12.)[15] The timing of any discretionary wage increases varies from year to year. Sysco Columbia's fiscal year runs from July 1 to June 30. (Tr. at 940:15-16.) Wage adjustments are typically granted in the first half of a fiscal year (July-December), but as the record shows, adjustments have also occurred during the second half of a fiscal year, or not at all.

The history of wage adjustments at Sysco Columbia evidences a highly discretionary process of granting adjustments, one that varies widely from year to year. As evidenced through Mike Turner's uncontested testimony and the supporting exhibits, the petitioned-for employees do not have any pattern of set increases, or even set criteria for determining eligibility for an increase. Some years, no changes were made to certain employees' pay. In others, entire incentive programs were replaced, drivers were moved from incentive plans to hourly rates, lump sum bonuses were given rather than wage increases, and weekly incentives were replaced or eliminated altogether. Even when wage increases have been granted, they have varied between increases to an employee's base pay or their incentive pay. The following chart shows the history of wage

[15] The GC at trial contended that Sysco Columbia should have additional documents regarding internal discussion of wage increases and that the Judge should draw an adverse inference from the alleged failure to produce such theoretical documents. There has been no evidence or testimony to suggest such documents exist. Mike Turner credibly testified that such discussions about employee wage adjustments are done in-person in meetings with senior staff. (Tr. at 1026:24-1027:7).

increases for employees in petitioned-for classifications at Sysco Columbia from 2010 to present, as supported by exhibits and testimony introduced by Sysco Columbia at trial.[16]

### i. History of Wage Adjustments for Drivers

| Date | Shuttle Driver | Delivery Driver | Specialty Driver |
|---|---|---|---|
| **July 4, 2010** | $0.66 increase to base | $0.65 increase to base | *n/a (job did not exist* |
| **July 10, 2011** | Change from ABC to DIP<br>No change to base rates<br>$35.00 weekly STS incentive added | Change from ABC to DIP<br>No change to base rates<br>$35.00 weekly STS incentive added | *n/a (job did not exist)* |
| **July 8, 2012** | $60.00 DriveCam Incentive replaces STS Incentive<br>No changes to rates | $60.00 DriveCam Incentive replaces STS<br>No changes to rates | $12.00<br>$3.00 Tractor Trailer Premium |
| **July 2013** | 1.5% increase to DIP rates<br>DriveCam Incentive unchanged | 1.5% increase to DIP rates<br>DriveCam Incentive Unchanged | $0.60 increase to base<br>Tractor Trailer Premium unchanged |
| **April 2014** | DIP Incentive Pay Eliminated<br>Base pay up $0.37<br>DriveCam Incentive eliminated | DIP Fusion implemented with grid rate of $27<br>New drivers set at $15.00 base rate<br>No change to base for grandfathered drivers<br>DriveCam Incentive eliminated | |
| **October 1, 2014** | $0.35 increase to wage rate | $0.45 increase to base rate<br>New driver base rate increased from $15.00 to $20.00<br>No change to grid rate | |
| **2015** | 2% increase to wage rate<br>Pay Bands implemented | $1000 lump sum payment<br>No changes to base rate or grid rate<br>Pay Bands implemented | Base increased to $14.07<br>Pay Bands implemented |
| **2016** | $0.25 increase to wage rate | $1.00 increase to base for new drivers (no increase to base for grandfathered drivers)<br>Grid rate increased by $0.30<br>Base rate unchanged<br>$500 annual safety bonus added | $0.25 increase to base |

[16] This chart addresses only the petitioned-for classifications. The wage adjustment process for warehouse employees is separate, and there is no record evidence to show that wage adjustments granted to warehouse employees are related in any way to any wage adjustments granted to drivers or fleet maintenance employees.

There are three classifications of drivers within Sysco Columbia: Delivery Drivers, Shuttle Drivers and Specialty Drivers. (Tr. 41:11-25.)

**Delivery Drivers**

As noted above, the history of pay adjustments for Delivery Drivers at Sysco Columbia varies widely from year to year in timing, structure, and amount. For the fiscal year 2011, Delivery Drivers[17] received an increase in their default/base rate from $21.95 to $22.60 under the then-existing Activity Based Compensation ("ABC") incentive plan. (Tr. 980:23-25; R. Ex. 19). The change was effective July 4, 2010. (R. Ex. 19.)

For fiscal year 2012, Delivery Drivers were moved from the ABC plan to the Driver Incentive Program ("DIP") (Tr. 986:14-16.) That year, default/base pay remained the same, but each associated task now had a new and independent dollar value.[18] (Tr. 986:17-23.) A $35.00 per week STS incentive was also added to Delivery Drivers' compensation, which could be earned if the Delivery Driver hit targets of achievement.[19] (Tr. 987:2:5.) There was no change to the default rate, and thus, the only change to Delivery Drivers wages (other than the implementation of the revised incentive program) was the potential $35.00 per week STS incentive. (Tr. 987:6-10; 988:1-14.) The change was effective July 10, 2011. (R. Ex. 19.)

For fiscal year 2013, the STS incentive of $35.00 was removed and a weekly incentive of $60.00, with new qualifiers, was added. (Tr. 998:19-25.) Instead of qualifying for a weekly bonus based on STS scanning, the DriveCam bonus was earned based on lack of coachable events, overspeed less than 2%, and idle time less than 5% (Tr. at 997:17-998:25.) This new weekly incentive was added because drive cameras were installed in every truck. (Tr. 998:19-25.) There

[17] For fiscal year 2011, Delivery Drivers were on an activity-based compensation ("ABC") plan. (Tr. 979:18-21).
[18] Under DIP, an employee could drop below the default/base rate. (Tr. 1003:5-15).
[19] As explained by Turner, the STS incentive was introduced when driver electronic devices were provided to the delivery drivers. (Tr. 987:13-22). There devices allowed the drivers to scan each package upon delivery. *Id.*

were no changes to the default/base pay or DIP. (Tr. 1000:15-16.) This change was effective July 8, 2012. (R. Ex. 21.)

For fiscal year 2014, there was an increase of 1.5% to each component of Delivery Drivers' DIP incentive, but there was no change to the hourly base pay for the Delivery Drivers. (Tr. 1002:23 – 1003:4; R. Ex. 25.) Thus, a Delivery Driver could potentially make more money if they worked above and beyond standard goals created by the Company (i.e. achieved incentive), or they could receive the same base rate of pay.

During April of fiscal year 2014 (the second half of the fiscal year), the Company changed Delivery Drivers' incentive pay program from DIP to DIP Fusion. (Tr. 1007:18-22.) DIP Fusion differed from DIP because DIP Fusion provided a "bottom" base rate that a Delivery Driver would be paid, whereas under DIP, a Delivery Driver could drop below the default pay. (Tr. 1008:1-10.) Under DIP Fusion, Delivery Drivers begin at a base/default level of pay, which is paid for "non-DIP activity." (Tr. 955:6-7; 962:1-13.) Most drivers are not paid based on the base rate, which is the rate for "non-DIP activity," other than when they get sick time or vacation or if they are a new driver. (Tr. at 962:8-13.)

Moreover, DIP Fusion provided a different rate scale numerator dollar value, and a grid rate was introduced, significantly higher than anything under DIP. (Tr. 1008:1-10.) The Company also introduced a ten-stop classification and put dollar values on each performance expectation, and removed all other incentives in place, including the $60.00 weekly incentive. (Tr. 1008:4:10.) Additionally, the default hourly rate was different depending on whether the Delivery Driver was a new hire or an existing employee (also referred to as a "grandfathered employee"). (Tr. 1008:16-20.) Significantly, and contrary to any of GC's arguments, starting pay for Delivery Drivers was effectively decreased in April 2014, as a result of the new DIP Fusion program. (Tr. 1008:21-22.)

On October 1, 2014, during the fiscal year 2015, Sysco Columbia increased the base/default pay for current Delivery Drivers by two percent, and moved new Delivery Drivers from a $15.00 base rate to $20.00. (Tr. 1014:4-6; R. Ex. 28)[20]. The grid rate remained unchanged at $27.00, and all other components under DIP fusion remained the same. (Tr: 1014:21-1015:4; R. Ex. 28.)

In fiscal year 2016, there were no changes to the DIP fusion program, default pay or the grid pay; in fiscal year 2016 Sysco Columbia elected to provide each employee a one-thousand dollar ($1,000.00) lump-sum payment in recognition for the 2015 fiscal year performance. (Tr. 1017:16-1018:3; R. Ex. 29.) This bonus was paid around September 2015. (Tr. at 1019:3-8.) No other changes were made to Delivery Driver compensation during the 2016 fiscal year. (Tr. 1018:6-9.)

For fiscal year 2017, the new Delivery Drivers received a base/default pay increase, while the grandfathered/current Delivery Drivers remained the same. (Tr. 1022:16-19; R. Ex. 32.) All Delivery Driver grid rates were increased by thirty-cents ($0.30). (Tr. 1022:19.) During fiscal year 2017, Sysco Columbia introduced a safety bonus for Delivery Drivers. (Tr. 1022:22-23.) This safety bonus was a $500.00 annual bonus, tracked by the calendar year. (Tr. 1022:23-25.) To receive this safety bonus, drivers had to remain accident free during driving through the calendar year of 2017. (Tr. 1023:16-17.)

**a. Shuttle Drivers**

For fiscal year 2011, Shuttle Drivers were also under the ABC plan, and were eligible to receive incentive pay, similar to the Delivery Drivers. (Tr. 983:10-14)[21]. Shuttle Drivers received

[20] As noted above, very little of the drivers' time is compensated at the base rate (Tr. 962:8-13.)
[21] The timing of wage increases for Shuttle Drivers and Specialty Drivers mirrors the timing of increases for the Delivery Drivers.

notification that their default/base rate was moving from $22.17 up to $22.83, effective July 4, 2010. (Tr. 985:7-12; R. Ex. 20.)

For fiscal year 2012, Shuttle Drivers transitioned to the DIP program, and received a $35.00 per week STS incentive compensation. (Tr. 992:12 – 993:5.)

In fiscal year 2013, Sysco Columbia removed the STS incentive of $35.00 for shuttle drivers and added a $60.00 weekly DriveCam incentive, with slightly different qualifiers from the Delivery Drivers' incentive criteria (specifically, a higher idle time percentage was allowable). (Tr. 1001:10-16.) Moreover, there was no increase in default rates or the DIP plan itself. (Tr. 1001:17-21.)

For fiscal year 2014, Shuttle Drivers received a 1.5% increase to each component of their DIP incentive pay, and their default hourly pay was not increased. (Tr. 1005:3-25; R. Ex. 26.)

In the middle of fiscal year 2014, there was an extremely significant change to the Shuttle Driver's pay. Specifically, the Company transitioned Shuttle Drivers from incentive-based compensation under DIP to strictly hourly pay, at a flat hourly rate of $23.20 (Tr. 1009:14-17; R. Ex. 28.)

In October 2014, during the fiscal year 2015, Shuttle Drivers received an increase of their hourly pay to $23.55. (Tr: 1016:19 – 1017:2; R. Ex. 28.) In fiscal year 2016, the Shuttle Drivers' hourly pay increased from $23.55 to $24.02, effective around September 2015. (Tr: 1020:8; R. Ex. 30.) In fiscal year 2017, Shuttle Drivers received an increase in pay from $24.04 to $24.27 per hour. (Tr. 1022:20-21; R. Ex. 32.)

**b. Specialty Drivers**

In fiscal year 2013, Sysco Columbia added Fish-Van Driver positions, which are now referred to as Specialty Drivers. (Tr. 1006:6-10.) At that time, the Specialty Drivers received an

hourly rate of pay starting at $12.00. (Tr. 1006:9-10.) In fiscal year 2014, Specialty Drivers received a five percent increase, making their starting pay $12.60 per hour. (Tr. 1006:10-12; R. Ex. 27.) Moreover, if the Specialty Driver had a Class A CDL, he/she would receive an additional $3.00 an hour compensation when performing on a bigger vehicle. (Tr. 1006:12-16.) In fiscal year 2016, the Specialty Drivers received an hourly increase to $14.04 an hour. (Tr. 1021:21-22.) No other changes were made. (Tr. 1021:21-22.) In 2017, the Specialty drivers received an hourly increase from $14.07 to $14.32 (R. Ex. 32.)

### ii. History of Wage Adjustments for Fleet Maintenance

| Date | Master Mechanic | Class A | Class B | PM Mechanic | Spotter |
|---|---|---|---|---|---|
| **July 4, 2010** | $0.80 increase to base | $0.65 increase to base | $0.60 increase to base | $0.55 increase to base | $0.50 increase to base |
| **July 10, 2011** | $0.75 increase to base | $0.65 increase to base | $0.60 increase to base | $0.55 increase to base | $0.45 increase to base |
| **July 8, 2012** | $0.55 increase to base | $0.50 increase to base | $0.50 increase to base | $0.40 increase to base | $0.29 increase to base |
| **July 2013** | $0.39 increase to base | $0.35 increase to base | $0.32 increase to base | $0.23 increase to base | $0.22 increase to base |
| **August 31, 2014** | $0.33 base increase (8/31/14) | $0.29 base increase | $0.26 base increase | $0.23 increase to base | $0.22 increase to base |
| **2015** | 2% raise to total<br><br>Attendance incentive eliminated | 2% raise to total<br><br>Attendance incentive eliminated | N/A<br><br>Pay Bands implemented | 2% increase to total<br><br>Pay Bands implemented | 2% increase to total<br><br>Pay Bands implemented |
| **2016** | 1.5-2% raise to total | 1.5% raise to total | N/A | 2% increase to total | 1.5% increase to total |

Similar to the Drivers, the Fleet Maintenance employees' annual pay adjustments – if any – are discretionary, not guaranteed, and are sporadic. Additionally, the wages of mechanics and spotters may be adjusted based on (1) the performance of the Company the previous fiscal year; (2) market data and competitor compensation; and (3) the discretion of upper management. (Tr. 1027:1-7.) The pay structure has evolved from a set rate of pay per grade to a range pay for fleet

maintenance employees, with a starting point, a mid-range, and an ending point for those positions. (Tr. 1042:24-1044:10; *see also* R. 38 (showing mid-rate and maximum for classifications).)

Mechanics' pay is also based in part upon certification, skills, and performance reviews; and spotters' pay is based on performance reviews. (Tr. 799:20-24; 940:19-21; 1054:24-1055:9.) Employees who receive certain certifications and skills can receive additional wage adjustments by moving into new classifications, even in the second half of a fiscal year. (Tr. 940:17-21, 953:3-11.) Changes in pay based on certifications and skills have continued through 2017 and 2018 as part of the status quo. (Tr.953:20-22.)

Mechanics and spotters received attendance bonuses from fiscal year 2011 until fiscal year 2016. (*See,* e.g., R. Ex. 33.)[22] Under this incentive, an employee received an additional amount of money added to his or her hourly rate if they had perfect attendance for that given week. (Tr. 1028:5-8.) As explained by Turner, the attendance incentive amounts varied per title and position, and were based on market and relevant compensation for those in similar positions in the industry and the Columbia, South Carolina market area. (Tr. 1028:19-24; R. Ex. 33.) All Fleet Maintenance employees received the attendance incentive until it was eliminated in fiscal year 2016. (Tr. 1046:1-2.) At that time, no other incentive replaced the attendance incentive, and employees were paid their hourly wage, with any increase based on individual performance up to a budgetary amount. (Tr. 1045:7-16.)

In fiscal year 2011, fleet maintenance employees received wage increases varying from $0.00 up to $0.80. (R. Ex. 33.) No relevant employee received an increase in the attendance incentive. In fiscal year 2012, the relevant employees received base rate increases ranging from $0.40 to $0.75, and did not receive an increase in their respective attendance incentives. (R. Ex.

[22] The Mechanics and Spotter are not on an incentive plan, like the drivers or certain warehouse employees. (Tr. 1031:6-12).

34.) The relevant employees received base rate increases in fiscal year 2013, ranging from $0.00 up to $0.55. (Tr. 1033:22 – 1034:6; R. Ex. 35.) For fiscal year 2014, the relevant employees received base rate increases ranging from $0.25 up to $0.36, and did not receive an increase the attendance incentive. (Tr. 1036:13-18; R. Ex. 36.) The relevant employees received base rate increases for fiscal year 2015 ranging from $0.19 to $0.33, and did not receive increases to their attendance incentives. (R. Ex. 37.)

In fiscal year 2016, Sysco Columbia underwent a major revision of its compensation system for non-incentive associates. (Tr. 1043:13-16.) The attendance incentive plan was completely eliminated under the new compensation plan. (Tr. 1046:1-2.) Under the new plan, the Company utilized a starting, mid and end point for each particular position, and increases were a result of individual employees' performance under Sysco CMP, the Company's "Coaching and Maximizing Performance" program. (Tr. 1043:19-1044:7.) As explained by Turner, the compensation plan now had a budgetary amount that supervisors could provide to his or her employees, *based on the supervisor's subjective evaluation of the employee's performance*. (Tr. 1048:17 – 1049:8; 1055:20-1056:17.)[23] The various mechanics were reclassified as "technicians," the spotters were reclassified as "maintenance utility worker technicians" and they all received increases of 2-2½% (R. Ex. 38.)

In 2017, two Fleet Technician IIs (Journeymen) and one Fleet Technician III (Master) were granted a 2% raise. (R. Ex. 39.) The other Fleet Technician IIIs (Masters) and the three maintenance utility technicians were granted a 1.5% raise (R. Ex. 39.)

[23] Since this change was made, some Sysco Columbia Master Mechanics (now referred to as "Fleet Technician III, Master") have differing salaries, whereas historically, all were paid the same. (See R. Ex. 39) (showing differing rates for employees classified as Fleet Technician III, Master).

## V. LEGAL ANALYSIS

### A. The General Counsel's Burden of Proof

In order to prove a Section 8(a)(1) violation, the General Counsel must establish that the employer engaged in conduct that would reasonably tend to restrain, coerce or interfere with employees' rights under the Act. *Webasto Sunroofs Inc.*, 342 NLRB 1222, 1223 (2004) citing *Am. Freightways Co.*, 124 NLRB 146, 147 (1959). The General Counsel must prove by a preponderance of the evidence that the actions of the employer were sufficient to restrain, coerce or interfere with employee's rights under the Act. *Cheyney Constr. Inc.*, 344 NLRB 238, 239 (2005)(finding no violation of the Act because the objective facts did not prove a violation by a preponderance of the evidence); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995) ("[I]t is well established that the test of interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act.").

Regarding the General Counsel's burden in 8(a)(3) cases, the Board has adopted the following standard:

> [W]e shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

*Wright Line, a Div. of Wright Line, Inc*., 251 NLRB 1083, 1089 (1980).

### B. The General Counsel Has Failed To Show That Sysco Columbia Unlawfully Decreased Employees' Benefits by Allegedly Withholding a Planned Wage Increase or That Sysco Columbia Unlawfully Blamed Such Action on the Union

In the Complaint, the GC makes two allegations with respect to Sysco Columbia's handling of wages in September 2017. First, the GC alleges that by issuing the September 25, 2017, memorandum ("the September Memo") informing Delivery and Fleet employees they "would not receive their September wage adjustment," (GC Ex. 3), Sysco Columbia interfered with employees' Section 7 rights and thus violated Section 8(a)(1) of the Act. Second, the GC alleges that by "withholding a September wage adjustment" in 2017, Sysco Columbia violated Sections 8(a)(1) and 8(a)(3) of the Act.

With these allegations, the GC makes two very incorrect legal and factual assumptions, which eviscerate the GC's case. The first assumption is that any standard "required by the status quo" September wage adjustment for Drivers or Fleet Maintenance employees existed at all. The second incorrect assumption is that in September 2017, Sysco Columbia was in the same legal position with respect to the Drivers and their petition, 10-RC-194843, as the Company was to the Fleet Maintenance employees and their petition, 10-RC-195759. As shown below, the GC fails to establish his case because no "standard" September wage increase existed, nor was one planned; Sysco Columbia's actions were supported by extant law; and the September Memo properly explained to employees the law and Sysco Columbia's actions and intent.

**i. Sysco Columbia never "withheld a benefit" because a September 2017 wage adjustment was never "planned" or "established."**

As the hearing record indicates, the GC cannot prove that a planned September wage adjustment ever existed.[24] There were no "standard" wage adjustments set for Sysco Columbia to withhold from employees; therefore, no benefits to "decrease," and, thus, no violations of Section

[24] As the memorandum at issue indicates, the timing of the communications was prompted by employees, not some planned event.

8(a)(1) or Section 8(a)(3), whether from the September Memo itself or from the absence of a "September 2017" wage adjustment.

During the critical period in any representation election, an employer is required to maintain the status quo with respect to wages, benefits, and other terms and conditions of employment. Indeed, as a general rule, an employer's legal duty in deciding whether to grant or withhold a benefit while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. See *R. Dakin & Co.*, 284 NLRB 98 (1987), cited in *United Airlines Servs. Corp. Employer Support Servs., Inc.*, 290 NLRB 954 (1988)(quoting *Reds Express*, 268 NLRB 1154, 1155 (1984)).

A violation will occur, however, if a withheld wage adjustment is either an already planned event or a "standard" or "established" practice. *NLRB v. Katz*, 369 U.S. 736 (1962); *E.I. du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 67 (D.C. Cir. 2012). In other words, according to the Board's own logic, the employer must have either a planned wage adjustment or a standard practice of wage adjustments for the "status quo" to require an adjustment during the pendency of a representation election. Without such status quo, the absence of an increase cannot constitute in any logical way an unlawful "withholding of a benefit."

The Seventh Circuit most clearly lays out the Board's logic and analysis on this point. In *NLRB v. Aluminum Casting & Eng'g Co.*, 230 F.3d 286 (7th Cir. 2000), the court upheld the Board's finding that an employer unlawfully withheld a wage increase in violation of the Act during a representation case. The court first noted the basic premise that an employer violates the Act if it departs from an established practice of granting wage increases because of a union organizing campaign. *Aluminum Casting*, at 290 (citing *NLRB v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 557-58 (7th Cir. 1993) and *NLRB v. Don's Olney Foods, Inc.*, 870 F.2d 1279, 1285 (7th

Cir. 1989)). The court then identified the initial and critical factual premise that must exist before finding such a violation and the potential dilemma an employer faces if that fact does not exist:

> A *critical factual question* underlies this part of the Board's case: did [the employer] have an established practice of granting annual across-the-board wage increases at the time the Union began its organizing campaign . . . ? Both the ALJ and the Board found as a fact that it did, and so the question for us is whether that finding is supported by substantial evidence. Once we have resolved that point, the rest of this part of the case falls in place. [The employer's] position is that it was between a rock and a hard place during the campaign: if it granted the wage increase, it would violate section 8(a)(1) by giving an impermissible benefit . . . ; if it did not, it would find itself where it does today. *The dilemma was real . . . if there was no established practice.*

*Id.* (internal citations omitted)(emphasis added). As the record demonstrates, the status quo for both Drivers and Fleet Maintenance employees, is that Sysco Columbia has no "established practice" for September wage adjustments. Thus, the contemplated dilemma was thus very real in September 2017.

As the record shows, no September wage adjustment was planned. Further, the evidence is clear that the "status quo" at Sysco Columbia does not include any specific annual wage increase. Between 2010 and the present, drivers at Sysco Columbia have experienced increases to base rates, increases to incentive rates, the introduction (and eventual elimination) of weekly incentives based on scanning, the introduction (and eventual elimination) of weekly incentives based on DriveCam criteria, the elimination of incentive pay altogether for some classifications (like shuttle drivers), an annual safety bonus, a one-time lump-sum bonus, and reductions in the hourly rate for new employees. Fleet Maintenance employees have experienced the elimination of an attendance bonus, the introduction of pay bands (providing for varying pay rates within the same classification), and the transition to a CMP program that subjectively evaluates performance.

There simply is no set formula or method for determining whether Sysco Columbia will grant a wage increase. Rather, the process – for both drivers and fleet maintenance employees –

is highly discretionary and varies greatly from year to year. Therefore, there is no "status quo" when it comes to annual adjustments at Sysco Columbia.

Mike Turner offered extensive and detailed testimony regarding the history of wage adjustments at Sysco Columbia. Turner's testimony and the supporting documentary evidence offered by Sysco Columbia was unrebutted by the General Counsel. In fact, the General Counsel presented no testimony on the history of wage increases at Sysco Columbia, failing to ask a single driver or fleet maintenance employee about wage increases and whether they anticipated any wage increase in 2017. Some witnesses were actually under the impression that their pay had gone *down* in recent years, which completely contradicts the GC's claim. (*See* Tr. 706:4-7) (GC witness Driver John Gruber testifying "pay has gone down"); (Tr. 1215:10-12) (Todd Shanning testifying "[W]e believe that the pay has gone backwards a little bit with the DIP situation, with the DIP incentive program that we are in.")

While Sysco Columbia has complied with the law by not granting any discretionary wage adjustments since the union organizing campaign began, it has continued to adjust employees' pay in two important respects. First, drivers can have their pay changed by asking Sysco Columbia to reclassify a stop, which directly impacts their pay. Second, fleet maintenance employees have the ability to change their job classification by obtaining additional experience and certifications. Both of those processes have remained in effect while the Union's petitions have been pending.

With the introduction of DIP Fusion, the "stop classifications" of drivers' deliveries became extremely important to delivery drivers' pay. (Tr. 959:7-21; 1007:25-1008:10.) Under DIP Fusion, each delivery is given a classification number, which is an indication of how long the job will take based on how difficult the delivery is. (Tr. 959:7-16, 975:14-16, 976:6-16; R. Ex. 17.) The larger the number, the more time-consuming the stop, which translates into more money for

the Driver. (Tr. 904:15-20, 905:3-7, 959:9-16; R. Ex. 17.) Crucially, if a driver believes a stop has been misclassified, he or she can fill out a Customer Classification Change Form. (Tr. 904:12-14, 963:19-964:10; R. Ex. 15, R. Ex. 18.) As evidenced in the testimony of Bo Nash, Director of Transportation, and Mike Turner, the classification forms and stop classification program were used prior to *and after* the filing of the petition. (Tr. 904; R. Ex. 15, R. Ex. 18.) As an example, Sysco Columbia introduced a sample stop classification form dated May 19, 2017, pursuant to which a particular stop was changed from a "2" to a "6," pursuant to a driver's request. (R. Ex. 18.)

As noted above, mechanics' pay is based in part on certification and skills. (Tr. 799:20-24, 940:19-21, 1054:24-1055:9.) Employees who receive certain certifications and skills can advance to other job classifications, and changes in pay based on certifications and skills have continued through 2017 and 2018. (Tr. 1056:18-1057:4.) As such, Sysco Columbia has maintained the status quo while the Union's petitions are pending.

**ii. Sysco Columbia's Potential Obligation to Bargain with a Driver Union in this case provides it with additional justification for not providing a September 2017 wage adjustment to Drivers.**

The procedural posture of this case is unique. First, the alleged misconduct potentially affects two separate representation cases, the Driver case, No. 10-RC-194843, and the Fleet Maintenance case, No. 10-RC-195759. Second, the GC asserts in the Complaint that "a" (not "the")[25] September 2017 wage adjustment was allegedly withheld from employees in distinct job classifications with different pay schemes and processes. (GC Exs. 8(a) & 9(a); 251:13-18.) Third, the Union did not file the first blocking charge, 10-CA-197586, in the Driver's election, 10-RC-

[25] Perhaps the GC's use of "a" and not "the" in the Complaint's assertion of facts to support the Section 8(a)(3) withholding of a benefit allegation is a conscious recognition that a September 2017 increase was not an established practice. (See Consolidated Complaint ¶¶ 10 & 11). Regardless, it should recognize no established practice existed.

194843, until twelve days after manual Driver voting occurred and merely one day before the deadline for mail ballots to arrive at Region 10. (GC Exs. 8(a), 8(c).)[26] Fourth, the Regional Director impounded all Driver ballots scheduled by the Stipulated Election Agreement for the Region to count on April 28, 2017. (GC Ex. 8(c).) Fifth, given the impoundment of Driver ballots, a potentially valid Tally of Ballots in the Union's favor may exist sometime in the future with respect to the Driver election. Finally, given extant Board Law, the existence of that tally could retroactively place on the Company an obligation to bargain as of the Union vote, at least with respect to the Drivers.

This unique combination of circumstances, one unfortunately created by the Board's blocking charge policy, is extremely relevant to Sysco Columbia's issuance of the September Memo. As discussed above, Sysco Columbia contends that no planned or practice of schedule of wage adjustments existed for Drivers. Thus, Sysco Columbia found itself in the "rock and a hard place dilemma" specifically recognized in *Aluminum Casting*. The dilemma, however, does not stop there. With respect to the Drivers, Sysco Columbia faced yet a second "rock and a hard place." Because a potentially valid vote existed as of April 28, 2017, Sysco Columbia faces a potential obligation to notify and provide the Union a sufficient opportunity to bargain over wage adjustments with significant discretionary components, retroactive to the date of the election, April 28, 2017.

It is black letter Board law that an employer making unilateral changes after a valid vote in favor of a union, but without notice and opportunity to bargain to the union and before the representation-case process is complete, violates Section 8(a)(5). Indeed, "an employer that chooses unilaterally to change its employees' terms and conditions of employment between the

[26] Sysco Columbia requests that the ALJ take judicial notice of the Board's recorded filing date for 10-CA-197586. *See* https://www.nlrb.gov/search/cases/10-CA-197586 and GC Ex. 8(c).

time of an election and the time of certification does so at its own peril, if the union is ultimately certified." *Overnite Transp. Co.*, 335 NLRB 372 (2001), citing *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974) (reversed and remanded on other grounds, 512 F.2d 684, (8th Cir. 1975)). In addition, "the duty to bargain, at least in the sense of a prohibition on unilateral changes, attaches as of the election date." *Celotex Corp.,* 259 NLRB 1186, 1193 (1982)(emphasis added).

Even more to the point, the Board law at the time (September 2017) that addressed an employer's obligation to bargain over unilateral changes demanded that Sysco Columbia not make any change with respect to any wage adjustment with any discretion. *E.I. du Pont de Nemours*, 364 NLRB No. 113 (August 26, 2016), infra. Sysco Columbia correctly contends that its pay practices are neither standard nor planned – and that they never even come close to a past practice, especially given the amount of discretion at every step of the process. The GC argues the opposite. On this point, however, and regardless of who is correct, not granting a wage adjustment to Drivers, and informing them why, perfectly aligned with the Board law extant in September 2017.

To reach this conclusion, one must consider *E.I. du Pont de Nemours*, 364 NLRB No. 113 (August 26, 2016)("*DuPont*"), overturned by *Raytheon Network Centric Sy.*, 365 NLRB No. 161 (Dec. 15, 2017). As of September 2017, when Sysco Columbia informed employees of the status of a "typical" (not planned and purely discretionary) September wage adjustment, (Tr. 82:18-22; GC Ex. 3), *DuPont* was the law, the law that placed Sysco Columbia at peril for any Driver pay changes. Specifically, under the aspect of the *DuPont* standard relevant to the law on September 25, 2017, the date of the September Memo, the Board had held "that bargaining would always be required, in the absence of a [collective bargaining agreement], in every case where the employer's actions involved some type of 'discretion' " and regardless of any past employer practice. *Raytheon*, 365 NLRB No. 161 at p.1 (describing the relevant holding in *DuPont*).

*Mike O'Connor*, *Celotex*, and *DuPont* make one thing abundantly clear. When Sysco Columbia issued the September Memo, it faced more than one dilemma with respect to any wage adjustment – indeed, the dual dilemmas were real then, are now, and will be at any time until the Driver petition is resolved. Not only did the "rock and a hard place" of employee questions regarding a discretionary increase exist, there was the very real peril of a Section 8(a)(5) violation for unilaterally granting a wage adjustment with large discretionary components. In light of these dilemmas, the absence of any definitive annual pay raise for Drivers, and specific questions from employees regarding their pay, Sysco Columbia chose the prudent – and the legal – course of action. That course of action was to refrain from implementing any discretionary increase in response to the employee questions before the Driver petition was resolved and then to explain to the drivers why – that Sysco Columbia had to maintain the status quo.

Indeed, the Company was well within its rights and following the law when issuing the September Memo, especially when viewed in the context of the message's impact on Drivers.[27] The Drivers had already voted. There was no chance and thus no motive for the Company to try to influence their vote – the Drivers' ballots were "in the box." No direction of a re-run election existed. Telling the Drivers that they are in the status quo and that no discretionary wage adjustments could occur until the petitions were resolved described exactly the position in which the Drivers and Sysco Columbia found themselves in September 2017. A majority of the already cast and impounded Driver ballots may show a majority status for the Union. Viewed in this light, the September 2017 Memo is nothing more than Sysco Columbia properly exercising its rights

[27] There are approximately one-hundred twenty-four (124) Delivery Drivers, sixteen (16) Shuttle Drivers, and five (5) Specialty Drivers in the Driver unit; in addition, there are approximately nine (9) employees in the Fleet Maintenance Department. (Tr. 300:4-14).

under Section 8(c) to communicate with Drivers regarding their status, assuming they had voted for the union.

### iii. The September Memo to drivers and mechanics was factually accurate and lawful.

Even if one assumes a recurring September wage adjustment existed and was withheld (which is denied), Sysco Columbia's actions were lawful in the context of the two existing RC petitions.[28] The September Memo properly responded to employee questions with the law, which is that during campaigns, a company must follow the NLRA and cannot make discretionary changes. Moreover, Sysco Columbia stated two times in the September Memo that any delay to any discretionary wage adjustments would be resolved once the RC cases for both Drivers and Fleet Maintenance employees concluded. Therefore, the September Memo on its face does not imply an absence of retroactivity and conversely states the opposite – that retroactivity may or may not occur, "may" being the operative concept because no "pattern" of raises for Sysco Columbia exists, either in amounts or timing.[29]

A close review of the September Memo can lead to only one conclusion – everything stated therein is factually and legally accurate. The September Memo specifically states: (a) "federal law requires that a company maintain wages and benefits at the status quo until the petition is resolved through an election, withdrawn by the union, or dismissed;" (b) "we cannot legally make any discretionary adjustments to wages until the union's petitions are resolved;" (c) "Teamsters' filing of unfair labor practice claims against the company effectively blocked the Driver and Mechanics

[28] In good faith one really cannot assume such because the September Memo never said such discretionary adjustments to wages were being withheld, much less that a planned September increase even existed.

[29] We note that in the context of this case, "retroactivity" is not related to a discrete and planned wage adjustment amount Sysco Columbia would have given or even an established past practice of wage adjustments. Instead, it would only apply to Sysco Columbia's practice of possibly giving – and, perhaps, possibly not giving- wage adjustments to certain employees. Closely related to this concept is the GC's erroneous argument at the hearing for "full back-pay" retroactive to September 2017. There is no set wage adjustment to order.

elections;" and (d) "[t]here can be no changes to wages, benefits or other terms of employment while this process continues." (GC Ex. 3.) The letter clearly illustrates the Company's efforts to comply with the Act and ensure that it was not later charged with unfair labor practice charges for providing discretionary wages during the critical period or in derogation of the Union's right as the Drivers' bargaining representative.

As such, both Section 8(c) of the of the Act and the First Amendment to the United States Constitution provide protection to Sysco Columbia from any governmental burden or prohibition for the statements made in the September Memo. Under Section 8(c), "the expressing of any views, argument, or opinion, or the dissemination thereof, whether written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of a benefit." 29 U.S.C. §158(c). Sysco Columbia has done nothing more than exercise those statutory rights under Section 8(c) in this matter. Furthermore, the Constitution applies with equal vigor to statements made by commercial enterprises as to those made by individuals. Thus, to interpret the Act so expansively as to prohibit truthful, non-threatening recitations of exactly how the law operates surely must infringe upon the free speech right granted to employers by the First Amendment, notwithstanding any interpretation or application of Sections 8(a)(1) and 8(c) urged by the GC in this matter to the contrary.

In addition, the NLRB has recognized that employers do face a dilemma in a union campaign if a planned wage adjustment is set to occur in the critical period. This recognition has led to the development of what amounts to a "safe harbor" for employers who wish to avoid the possibility of looking like they want to interfere with employee free choice by either granting or withholding a wage increase after the petition and prior to the vote.

Even where an employer has planned wage or benefit adjustments (which was not the case here), the Board has held that it is lawful for the employer to delay such changes pending the resolution of the petitions. An employer does not violate the act when it explains to employees that: (1) benefits adjustments are only being suspended to avoid improperly influencing employees regarding their support for the union; and (2) that benefits adjustments will resume after the petition is resolved. See *Sam's Club*, 349 NLRB 1007 (2007)(Board reversed the ALJ's findings because the employer explained the law under the Act and expressed that such adjustments were going to occur after the vote); *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000) ("[W]hile an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees" that implementation will be deferred until after the election).

A close review of the September Memo lines neatly up with the above standard. First, the letter correctly states that the Company cannot provide such increases because of the unjust and unfair impact it may have on the Union and its petitions. Second, as clearly stated in the letter, the "discretionary adjustments to wages" were paused "until the union's petitions are resolved." The Company could not make it any clearer that the discretionary benefits could be distributed in the future. Just as the Board found in *Sam's Club*, an employer who informs its employee of the legal issue and the need to put off the discretionary wage adjustments until the NLRB issues a decision is perfectly legal. GC does not have a shred of evidence or testimony to support a contention that the Company does not plan to provide such discretionary wages once the legal issues have been resolved. Because Sysco Columbia satisfied the *Sam's Club* elements, the September Memo is not a violation with respect to either the Drivers or the Fleet Maintenance employees.

### C. The GC's allegations concerning the DVD shown to Sysco Columbia employees are factually and legally baseless.

The General Counsel alleges that Sysco Columbia unlawfully threatened to freeze wages in a DVD shown to employees. As an initial matter, the Complaint clearly misrepresents the content of the DVD. Paragraph 9 of the Second Amended Complaint states that Sysco "by DVD, threatened employees that their wages would remain frozen during negotiations if they choose the Union to represent them." (GC Ex. 1(a)). However, there is no dispute that the relevant portion of the DVD actually says: "And even if you didn't pay dues or didn't support the union, your wages and benefits would still be frozen *at the status quo*, during the possible months or years of negotiations." (GC Ex. 6 at 23)(emphasis added). Under Board law, no employee would reasonably interpret the actual language of the DVD as a threat to freeze wages.

The Board has repeatedly held statements like the statement contained in the DVD to be lawful. In a strikingly similar case, *Uarco, Inc.*, 286 NLRB 55 (1987), the Board held that the employer's references during a union organizing campaign to wages being "frozen" during negotiations would reasonably be construed by employees "to mean only that the Respondent would maintain the status quo pending negotiations," relying in part on employer's repeated communications to employees that benefits could be gained or lost in negotiations. See also *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992) (employer did not violate the Act by sending employees a booklet that stated "While bargaining goes on, wage and benefit problems typically remain frozen until changed, if at all, by a contract," noting that language about wages and benefits being frozen did not appear in any other campaign materials and there was no other objectionable language in the booklet); *Flexsteel Industries, Inc.*, 311 NLRB 257 (1993)(employer did not violate Act by telling employees "[n]egotations often go on for many months while your wages and benefits would be frozen by law (the Company could not unilaterally agree to give a wage

increase) while negotiations continue."); *Dillon Companies*, 340 NLRB 1260, 1274 (2003) (holding that employer's statement "that insurance would be 'frozen' during negotiation was, in context, no more than a statement that the Employer would not take unilateral action to change insurance."); *Naomi Knitting Plant*, 328 NLRB 1279, 1290 (1999) (employer did not violate Act by telling employees: "Also, we discussed that in this bargaining process, your wages/benefits to be NEGOTIATED, starts at ZERO and *your current wages/benefits can be frozen until the bargaining process is complete*. THERE ARE NO GUARANTEES.")(emphasis in original).

Like the employer in *Uarco*, Sysco Columbia repeatedly communicated to employees about the possibility of benefits being gained or lost in negotiations, as well as the fact that Sysco Columbia could not *unilaterally* grant *discretionary* wage and benefit changes during bargaining. For example, the Company distributed to employees a booklet stating:

> QUESTION:
>
> Can a company give its employees *discretionary* wage and benefit increases during ongoing contract negotiations?
>
> ANSWER:
>
> No. During the months or years of negotiations, a company cannot *unilaterally* grant wage and benefit improvements, even if those improvements are granted to nonunion employees at its other facilities. Source: NLRB v. Fitzgerald Mills Corp., 313 F.2d 260 (2d Cir.).

(R. Ex. 42)(emphasis added). This discussion about unilaterally granting improvements is strikingly similar to the comment the Board upheld in *Flexsteel Industries, Inc*., 311 NLRB 257 (1993)("Negotiations often go on for many months while your wages and benefits would be frozen by law (the Company could not unilaterally agree to give a wage increase) while negotiations continue.").

The booklet also contained the following questions and answers regarding the possibilities of bargaining:

> QUESTION:
>
> Would employees automatically get a contract with improved pay and benefits if they voted in union?
>
> ANSWER:
>
> No. The National Labor Relations Board has explained the risks associated with the collective bargaining process:
>
> "Collective bargaining is potentially hazardous for employees and that as a result of such negotiations, employees might possibly wind up with less…." Source: Coach and Equipment Sales Corp., 228 N.L.R.B. 441 (1977).
>
> A well-known federal court said the following about collective bargaining:
>
> "While the union assumes that its employees will always be at least as well off as non-union employees, collective bargaining entails the risk that they will be worse off." Source: Fieldcrest Cannon, Inc. v. NLRB, 97 F.3d 65 (4th Cir. 1996).
>
> QUESTION:
>
> Could employees risk losing existing benefits through collective bargaining?
>
> ANSWER:
>
> Yes. Under the law, a company is not even obligated, under some conditions, to agree to continue existing wages or benefits.
>
> QUESTION:
>
> Union organizers are telling us that with the union, we'll get everything we have now, plus more……and no dues until then. Is this true?
>
> ANSWER:
>
> No matter what union organizers may have told you, collective bargaining on a union contract does not start from a guaranteed base of the present wages and benefits. All current wages and benefits

> are as much a subject of negotiations. It is not unusual for a union to wind up trading existing employees' wages and benefits for things that only benefit the union, such as automatic deduction of dues ("dues checkoff").

*Id.*

Along the same lines, Brawner communicated the following about the status of negotiations at Sysco Southeast Florida to employees via text message:

> Federal law precluded Sysco Southeast Florida, LLC from unilaterally implementing any changes to wages and benefits until an agreement was reached with the union. Therefore, the SE Florida drivers were below the Florida market base rates for the last nine months.

(GC Ex. 10.)

Additionally, as noted above, Ronn English presented a "disclaimer" slide during meetings which several witnesses recalled and which stated:

> The purpose of this presentation is a follow-on discussion about information regarding the Teamsters' rules as they may relate to you as potentially-unionized workers.
>
> NO ONE CAN PREDICT future events…
>
> Therefore, no predictions will be made about what will happen if you become represented by the Teamsters.
>
> This is a discussion of FACTS and the LAW, as well as what CAN or MAY happen, NOT what WILL happen.

(R. Ex. 5 at 15; Tr. 862:18-19, 1074:9-14, 1112:14-24.)

In light the foregoing, the GC's claim is factually without legal merit. Moreover, no reasonable employee would interpret the DVD's statement about wages being "frozen at the status quo" as an unlawful threat. The General Counsel's efforts to downplay the plain language used in the video in order to assert a claim that Sysco Columbia threatened employees are absurd. Sysco Columbia merely stated – in plain terms – the status of the law concerning bargaining. *See*

*Neighborhood House Ass'*, 347 NLRB 553, 554 (2006)("As a general rule, where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse."); *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001)("It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed negotiations.").

### D. Mike Brawner's statements to drivers did not violate the Act.

#### i. Brawner was not an employee of Sysco Columbia LLC and did not have the authority to effect the promises alleged.

As an initial matter, no employee would reasonably construe Mike Brawner's alleged comments as representing a promise on behalf of Sysco Columbia, because Brawner did not work for Sysco Columbia and had no authority to effect the alleged promises. Brawner works for Sysco Corporation as the Market President for the Southeast. (Tr. 723:14-16.) He has not worked for Sysco Columbia since 2012, and some witnesses testified they did not know him prior to the campaign. (Tr. 351:5-19, 658:21-23, 726:1-2.) He spends the majority of his time working in Atlanta. (Tr. 725:1-2.) He has no authority to hire, fire, set wages, set benefits, or make day-to-day decisions on behalf of Sysco Columbia. (Tr. 803:21-804:5, 804:18-23.) His responsibility is making sure best business practices are shared among the 11 operating companies for which he is responsible, essentially behaving like "a consultant when they need something." (Tr. at 723:20-25; 804:9-17.) If he believes processes and best practices are not being adhered to by an operating company within his footprint, he has the ability to "influence" the operating company. (Tr. 820:22-821:1.) Because Brawner did not have any authority to improve employees' terms and conditions of employment, no employee would reasonably construe any of Brawner's alleged comments as a

promise that Sysco Columbia would make improvements to their terms and conditions of employment.

### ii. Brawner's statements were free speech protected under Section 8(c) of the Act

The GC alleges that Brawner "by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment, if the employees rejected the Union." (Amended Complaint at ¶ 7.) The GC contended at the hearing that Brawner solicited grievances and/or promised improved terms and conditions of employment by asking employees to "give [him] 12 months" to "fix things" at Sysco Columbia during employee meetings. The GC also contended that Brawner solicited employee grievances in one-on-one meetings. Even if these allegations were true, which is denied, the GC has failed to establish that they rise to the level of a violation of the Act.

Section 8(c) of the Act provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit." With respect to solicitation of grievances, "[i]t is…well-established that it is not the solicitation of grievances itself that violates the Act, but rather the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary." *Wal-Mart Stores*, 340 NLRB 637, 640 (2003). The Board has recognized that "generalized expressions of an employer's desire to make things better have long been held to be within the limits of campaign propaganda." *MacDonald Machinery Co.,* 335 NLRB 319, 319 (2001).

Pleas for "a year" or "more time" to address employee issues have repeatedly been found lawful by the Board, *as long as they are not accompanied by a promise of specific improvements*.

See *Noah's New York Bagels, Inc*., 324 NLRB 266 (1997)(employer did not violate the Act by telling employees that the filing of the petition indicated the supervisory team had "messed up" and telling employees: "Please vote to give us a second chance *to show what we can do*. If we don't meet your expectations, the Teamsters will be there—they'll be just as happy to take your dues and initiation fees later as they are now," because "Respondent did not make any specific promise that any particular matter would be improved.")(emphasis added); *National Micronetics, Inc*., 277 NLRB 993 (1985) (company vice president did not violate the Act by asking employees to give him "more time" and a "second chance to *see if they could make things better*" where "[t]he statements do not promise that anything in particular will happen," but instead indicate "a general desire to make things better") (emphasis added); *Keeler Brass Co*., 301 NLRB 769 (1991) (no violation of the Act where company president told employees: "Be fair to me *and give me the opportunity to prove myself*. If I let you down, under the law, the UAW can petition for a new election in one year, and they can campaign throughout that period if they want to.")(emphasis added); *Purple Communications, Inc.*, 361 NLRB No. 1050 (2014) (Company CEO/President did not violate the Act by stating: "[i]f given an opportunity over the next 12 months [*to] evaluate whether, you know, conditions in their mind relative to what is controllable versus that which is not controllable has improved or has not improved* and you could always address a Union situation 12 months later. But give us an opportunity to bridge that divide," where employer did not make any promises of specific improvements)(emphasis added); *Peerless of America, Inc*., 198 NLRB 982 (1972) (Company official did not violate the Act by telling employees the facility had a bright future "if employees would give them six months *to get everything ironed out*.") (emphasis added); *Newbury Eggs, Inc*., 357 NLRB 2191 (2011) (holding employer did not violate the Act by asking employees to "give me one more chance…."); *Blue Diamond*, No. 20-CA-34199, 2009 WL

2923261 (NLRB Div. of Judges Sept. 8, 2009) (holding GC was "grasping at straws" by arguing that company solicited grievances when [position] asked employees "to give me a *year to deal with the issues that you've told me about*," where "[t]here certainly was no promise to resolve any particular grievance….")(emphasis added).[30]

As shown below, Brawner's alleged comments were merely "generalized expressions of an employer's desire to make things better" like the .comments held lawful in the cases cited above. Because Brawner never explicitly or implicitly promised improvements to employees' terms and conditions of employment, Sysco Columbia cannot be held to have violated the Act.

**iii. The GC's allegations of unlawful solicitation of grievances and promises by Brawner are not supported by the credible evidence of record.**

No witness testified that Brawner promised employees any increase in wages or benefits during the union campaign. Instead, virtually every witness, including the overwhelming majority of the GC's witnesses, admitted that Brawner never promised any improvements whatsoever to terms and conditions of employment. (*See* Tr. 165:4:12, 206:9-18, 244:14-22, 285:25-286:3, 324:15-325:7, 362:5-17, 501:12-25, 716:22-717:10, 847:13-16, 85613-25, 870:13-871:15, 1084:1-5, 1085:13-1086:11, 1220:2-6.) Travis Gates, one of the General Counsel's witnesses, acknowledged that Brawner expressly told employees he could not promise them anything. (Tr. 338:11-21.) Similarly, another of the GC's witnesses, Johnathan Brewer, said Brawner told employees that adjustments to their pay were "a [Sysco Columbia's] corporate decision" and that

[30] A very small number employees testified that Brawner said he would "look into" certain complaints they raised during meetings. The overwhelming majority of witnesses did not support this testimony. Even if Brawner had made such comments, it would not violate the Act. *New Process Co*., 290 NLRB 704, 738 (1988) (employer did not violate Act when "in response to an employee's complaints, told the employee that if she had such problems, she should call him on the phone and they would look into it."); *Purple Communications*, 361 NLRB No. 126 (2014) (employer did not violate Act by asking for "12 months to improve communications and work with employees to address their concerns" and telling employees he was "looking into" certain issues raised by employees, where the employer did not make any promises of specific improvements).

"there's nothing I can handle as far as that goes." (Tr. 181:24-182:3.) Therefore, even if Brawner requested 12 months to "fix" the Company, "make it right," or "make it better," could be regarded as a "soliciting grievances," which is denied, it would not violate the Act.[31]

Only one witness claimed that Brawner promised any specific changes that would have a significant impact on drivers' terms and conditions of employment, and that witness' testimony was not credible. Joe Perisee, a shuttle driver in the Hilton Head domicile yard, claimed that Brawner said "we can do that" when a driver asked if the Company could guarantee shuttle drivers a 40-hour workweek. (Tr. 260:2-5.) However, the driver who asked Brawner that question (Todd Shanning), as well as the other shuttle driver in the Hilton Head domicile yard (Rodney Mayers), both credibly testified that Brawner never promised to give shuttle drivers 40 hours per week. (*See* Tr. 1069:17-1070:11, 1213:20-1214:20.)

Perisee also claimed that Brawner told drivers the Company was working on a new incentive pay plan for route drivers. (Tr. 265:66.) Todd Shanning confirmed that Brawner referenced a new incentive pay plan during a meeting, but clarified that he did so after Shanning brought it up and that Brawner said "Sysco, as *a whole company nationwide*, is looking at that." (Tr. 1214:23-1215:4.) Referring to the incentive plan as being something Sysco Corporation, a parent company, and a separate legal entity, was already examining nationwide is not an unlawful promise. See *TNT Logistics North America, Inc*., 345 NLRB 290, 292 (2005)(supervisor's comment to employee that wages were in the process of being negotiated with the employer's

[31] Many witnesses admitted that Brawner never asked them to identify grievances. (Tr. at 174:15-20, 847:15-16, 856:22-25, 859:4-9, 882:12-16). Simply asking if employees "have any questions," as a small number of employees testified Brawner did, is not an unlawful solicitation of grievances. *Curwood, Inc*., 339 NLRB 1137, 1140 (2003) (holding that employer asking whether employees have any questions was not an unlawful solicitation of grievances, where the question was clearly intended to refer to questions about the election process and about the employer's views concerning unionization); *New Process Co*., 290 NLRB 704, 738 (1988) (employer did not violate the act by asking employees if they had any questions).

customer "could not reasonably be construed as either an express or implicit promise to remedy [the employee's] pay complaints if he did not vote for the Union").[32]

Several witnesses testified about Brawner comparing Sysco Columbia employees' wages and benefits with the wages and benefits at unionized Sysco operating companies, which provides necessary context for Brawner's comments. Many employee witnesses recalled Brawner comparing their existing wages and benefits to the wages and benefits received by Sysco Atlanta employees. (Tr. 156:24-157:2; 249:11-14, 268:3-18, 324:20-22; 1096:1-18) (*See also* R. Ex. 5 at 2-3, 13.) Patrick Windham also testified that Brawner sent him a document comparing wages at Sysco Southeast Florida to wages at Sysco Columbia and noting "Sysco Columbia drivers still make significantly more than SE Florida drivers and have no obligations to pay union dues…." (Tr. 357:19-21; GC Ex. 10.) Along the same lines, Sysco Columbia sent its employees communications discussing the risk that employees could end up with lower wages and fewer benefits through the collective bargaining process. (R. Ex. 42.) Clearly, the thrust of Sysco Columbia's communications to its employees, including Brawner's comments, was that their current wages and benefits were *better* than the wages and benefits of union-represented employees and that they could possibly lose some of their existing wages and benefits through the collective bargaining process, not that Sysco Columbia intended to *improve* their existing terms and conditions of employment.

[32] After being shown his confidential witness affidavit to refresh his recollection, one witness, Josh Taylor, testified about certain vague statements by Brawner about requiring supervisors to work out of the Columbia facility ("all it takes is one call to fix that") and about how he "could bring back employee banquets to Myrtle Beach." (Tr. At 666:3-10; 675:4-6). Taylor also claimed Brawner said in a phone conversation he "could bring back employee banquets to Myrtle Beach." (Tr. at 675:4-6). These vague statements about what Brawner "could" do simply do not rise to the level of an unlawful promise. See *Rupp Forge Co*., 201 NLRB 393, 403 (1973) (holding that employer's promise to throw a party if the Company won the election did not violate the Act insofar as it was not "a promise of a benefit that is significant or has any significant impact upon an employee exercising his rights under Section 7 of the Act, or in voting a free choice as to a collective-bargaining representative or not.")

Many witnesses acknowledged that Brawner talked about restoring a "family atmosphere" to the Company during his meetings with employees. (Tr. 170:13-19, 334:20-24, 855:8-23; 880:13-15; 1084:4-7; 1109:15-24; 1218:21-1219:8.) Brawner admitted that he "made mention to the fact that I could have an influence on relationships, making sure that we maintained the family environment that had always been at Sysco Columbia. (Tr. 742:2-4.) Other witnesses testified that Brawner referenced restoring the "balance" between Sales and Transportation, because the Company had become too sales-driven. (Tr. 170:6:15; 708:7-10; 1208:16-22.)[33] None of these comments contain any promise of a benefit. Further, they provide needed context for Brawner's request that employees "give him 12 months." His request was clearly *not* for 12 months to make improvements to terms and conditions of employment, which Sysco contended were already favorable, but rather to restore a family atmosphere and the operational "balance" between Sales and Transportation. Brawner testified that "when things are out of balance [between sales and the rest of the company] it can be very expensive for the company." (Tr. 738:11-16).

At trial, the GC appeared to suggest that Brawner either made an implied promise or threatened employees by saying he could help them if they voted "no," but would be unable to help employees if they voted yes. There was very little testimony about such comments, and the testimony the GC did offer was equivocal, not credible, and not indicative of any unlawful promise, threat, or solicitation of grievances. For example, Dane Lacount testified that Brawner said he "didn't know" whether it would be possible for him to affect things positively if employees voted the Union in, before discussing the wages and benefits negotiated at Sysco Atlanta. (Tr. 236:16-

[33] As Brawner noted, having Sales drive the Company resulted in more frequent deliveries to customers, which is a "process issue" inconsistent with Sysco's operational best practices. (Tr. at 826:8-827:9).

22.)[34] Similarly, according to Johnathan Brewer's affidavit, Brawner merely noted that if employees voted the Union in, the Company would have to negotiate with the union before making changes, rather than making those changes on their own. (Tr. 163:3-14.) Brawner's comments were clearly intended to communicate that he would have to bargain with the Union before making changes if employees voted in the Union, which is an accurate and lawful statement of the law. See *Tri-Cast, Inc*., 274 NLRB 377 (1985) ("There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before."). Brawner's alleged statement that he would not be involved if the union won the election merely reflected the realities of collective bargaining and his experience. (Tr. 743:10-14.) *Flagstaff Medical Center, Inc*., 357 NLRB 659, 679 (2011)(manager's statement that "he" would not be negotiating with the union only meant that he himself would not be the one at the bargaining table and thus did not constitute an unlawful threat.)

As the testimony and case law cited above shows, Brawner did not make any unlawful promises or unlawfully solicit grievances. At most, his vague requests for "12 months" were a generalized expression of a desire to make things better, which is well within the bounds of acceptable speech under Section 8(c).

#### iv. Brawner Did Not Violate The Act In Any Phone Conversations or One-on-One Conversations With Employees

[34] One of the General Counsel's witnesses, Travis Gates, claimed Brawner told employees if they voted yes, he could not help them, but if they voted no, he could. Gates was not a credible witness. For example, he claimed he attended 25 meetings and that Brawner was present at "pretty much all of them." (Tr. at 329:1-15). He also claimed Brawner spoke at all of the meetings he attended. (Tr. at 331:2-4). By contrast, virtually every other witness testified that Brawner was only present at one or two of the meetings they attended, and no witness claimed to have attended more than 10 meetings at the most. Gates' credibility is also impugned by the fact that he repudiated his own sworn witness affidavit, which claimed Brawner said "if you vote yes, *I can't help you in the way you want me to*." (Tr. at 339:4-341:20).

The week before the hearing in this case commenced, the GC moved to amend its Complaint to allege that Mike Brawner violated the Act by soliciting grievances "[a]bout early April 2017, by telephone." At trial, the General Counsel presented three witnesses who claimed to have spoken with Brawner by telephone. None of their testimony establishes a violation of the Act.

John Porter testified about a call where Brawner asked about how he was doing and "how [he] felt about what was going on as far as the Union and where we stood with Sysco." (Tr. 192:1-4.) Innocuous and casual inquiries like these simply do not rise to the level of a violation of the Act. See *Mission City Prod. Corp.*, 206 NLRB 280, 282 (1973) (holding employer did not violate Act by asking employee his "feelings" towards the Union, noting: "Before inquiries as to union membership and statements by employers can be held to be unfair labor practices, they must be shown to have some relation to the coercion or restraint of the employees in their right of self-organization. Infrequent, isolated, sporadic and innocuous inquiries of a few employees, as here, standing alone, do not constitute interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act.") Further, Porter admitted that this conversation took place a few weeks *after the election* and did not have anything to do with the votes cast in the election. (Tr. 207:2-210:22.) Therefore, even if this allegation was true, and even if such an innocuous inquiry would rise to the level of "solicitation of grievances," which is denied, this conversation would not have coerced or restrained Porter in his right of self-organization.

Patrick Windham testified that he had two phone conversations with Brawner. The first occurred after a fellow driver asked him to call Brawner. (Tr. 351:17-24.) During the first call, Windham claimed "the gist of the conversation" was that Brawner said "he would do what he could to make things better for us if we had any problems." (Tr. 354:1-8.) Windham admitted he

"wouldn't go with exact words because [he] can't recall exact words." *Id.* Windham also recalls that Brawner "may have said something about along the lines of we'd build as a team." (Tr. 354:18-21.) As noted above, the Board has recognized that "generalized expressions of an employer's desire to make things better have long been held to be within the limits of campaign propaganda." *MacDonald Machinery Co.*, 335 NLRB 319, 319 (2001). Therefore, Brawner's alleged comments would not violate the Act.

Windham testified that on another occasion, Brawner called him and "let[] him know that he wanted to check on us in the Florence yard." (Tr. 355:22-24.) Windham responded by telling Brawner they were good in Florence and telling Brawner to "let us know if we could do anything." (Tr. 356:2-4.) Brawner thanked Windham, and that was the end of the conversation. (Tr. 356:5-7.) Windham acknowledged that Brawner did not specifically identify any particular terms and conditions of employment he sought to improve and never mentioned any specific benefits in their conversations. (Tr. 362:13-17; 363:12-15.) Again, such innocuous comments do not rise to the level of solicitation of grievances.

Finally, Josh Taylor testified he had a phone conversation in April 2017 with Brawner in which Brawner told him about a union contract in South Florida where employees were receiving a pay increase, a signing bonus, and Teamsters insurance, which Brawner allegedly contended was cheaper than Sysco's insurance. (Tr. 676:5-22, 677:16-21.) Taylor's testimony was not credible insofar as he appeared to allege that Brawner was extolling the benefits enjoyed by union employees in South Florida, which would have been completely inconsistent with Sysco Columbia's message to employees in the campaign. For example, Brawner sent to employees a flyer showing that Sysco Columbia's wages were *better than* the wages as Sysco Southeast Florida, along with a message that Sysco Southeast Florida "opted to maintain the Sysco 401K & Sysco's

healthcare benefits and will pay Union Dues for those benefits you already enjoy." (GC 10.) It defies logic to suggest Brawner would sing the praises of a union contract in a conversation with an employee. Additionally, even if Taylor's allegations were true, factual statements like the ones alleged by Taylor do not violate the Act. See *Sheraton Plaza La Reina Hotel*, 269 NLRB 716, 718 (1984) (holding employer did not violate Act by truthful statement that union contracts in the area did not provide the sick leave benefits enjoyed by the employer's employees). Taylor admits that Brawner did not say or suggest to Taylor that what happened at the South Florida location would happen at Sysco Columbia. (Tr. 689:11-14.)

The GC also alleges that Brawner violated the Act in one-on-one conversations with employees. These allegations are beyond the scope of the Complaint and should not be considered by the ALJ,[35] nor should the ALJ consider the underlying testimony regarding allegations that are beyond the scope of the Complaint. Only four witnesses testified about one-on-one conversations with Brawner, and all of them acknowledged that Brawner did not promise any improvements to wages or benefits. None of their testimony establishes a violation of the Act, and many of those witnesses were not credible at trial.

Carlos Nuttry claimed he discussed "insurance coverage…and certain numbers" with Brawner in a one-on-one meeting in an office in the fleet shop. (Tr. 379:12-14.)[36] He said Brawner assured him that "you know, things would get better." (Tr. 379:14-15.) Nuttry could not testify regarding what Brawner actually said during this meeting because he "started to tune out a lot of stuff" as he "was kind of getting aggravated at that point." (Tr. 380:6-11.) Nuttry's vague testimony – even if true – would not establish a violation of the Act.

[35] In particular, there were no allegations regarding one-on-one conversations at Sysco Columbia's main facility in the Complaint, which only reference conversations occurring in the conference room at Sysco Columbia.
[36] As noted above, this allegation and Robert Anderson's allegation of a one-on-one meeting in an office in the fleet shop are clearly outside the scope of the Complaint and should be disregarded by the ALJ.

Robert Anderson claims he had a one-on-one discussion with Brawner in Dwayne McCloud's office (which is in the fleet shop, where Anderson works), in which Brawner asked him for "a chance to try and fix the problems that were incurred there at the facility." (Tr. 460:23-463:24.) As discussed below, Anderson was not a credible witness because he was proven to have falsified testimony about a document he claimed to have been shown by Jim Fix. Further, even if Fix's testimony regarding Brawner was credited, this testimony, in which Brawner is alleged to have asked for "a chance" and discussed the possibilities of bargaining, does not establish a violation of the Act.

Josh Taylor claimed that he had a ten-minute one-on-one discussion with Brawner at the Charleston yard. (Tr. 657:21-23, 660:9-19.) Taylor's recollection about this meeting was limited, even at the time he executed his affidavit in July 2017. (Tr. 686:3-7.) Taylor admitted Brawner did not promise any improvements to wages and benefits during their conversation. (Tr. 682:10-15.) Taylor claimed Brawner "may have said something along the lines that he was there to make things better" and that he may have asked Taylor for "12 months to change everything." (Tr. 664:1-3.) As shown above, such comments do not violate the Act.

After being shown his confidential Board affidavit to refresh his recollection, Taylor testified about certain vague statements by Brawner that would not rise to the level of an unlawful promise. Taylor claimed he had complained to Brawner about Sysco Columbia requiring supervisors to work out of the Columbia facility, and Brawner said "all it takes is one call to fix that." (Tr. 666:3-10.) Taylor also claimed Brawner said in a phone conversation he "could bring back employee banquets to Myrtle Beach." (Tr. 675:4-6.) These vague statements about what Brawner "could" do simply do not rise to the level of an unlawful promise. See *Rupp Forge Co.*, 201 NLRB 393, 403 (1973) (holding that employer's promise to throw a party if the Company

won the election did not violate the Act insofar as it was not "a promise of a benefit that is significant or has any significant impact upon an employee exercising his rights under Section 7 of the Act, or in voting a free choice as to a collective-bargaining representative or not.")

Finally, John Gruber claimed that he had a one-on-one conversation with Brawner at the Charleston yard in which Brawner approached him, asked about his family, and asked "What's going on?" (Tr. 705:10-706:4.) When Gruber told Brawner that drivers were unhappy because "the pay has gone down and the work has gone up," Brawner did not respond. (Tr. 706:4-14.) According to Gruber, this was the end of the conversation. *Id.* This testimony does not establish any violation of the Act, as Brawner's innocuous question of "What's going on?" simply cannot be regarded as unlawful solicitation of grievances or interrogation. See *Hogan Transp., Inc.*, 363 NLRB No. 196 (2016).

### v. The Recording Introduced by the General Counsel Must be Excluded from Evidence, and Even if Admitted, Does Not Establish a Violation of the Act

The GC attempted to introduce – through the testimony of several witnesses – an audio recording that a Sysco Columbia employee is alleged to have made in a meeting where Mike Brawner spoke, and a transcript of that recording (GC Ex.6.) despite Sysco Columbia's objections and despite the significant amount of hearing time the GC spent playing the recording and attempting to examine various witnesses regarding the recording, the GC refused to produce or even identify the person who allegedly made this recording. The GC refused to disclose how the recording was made, whether it was edited, what was edited, who had access to it, or any other relevant information regarding the origins and authenticity of the recording. The GC has not disclosed how the GC came to possess this recording, nor has the GC produced any evidence at all regarding the chain of custody.

Lest the GC argue that the statutory qualification of the NLRB's duty to apply the rules of evidence "so far as practicable" really means that there are no rules and the GC does not have to lay any foundation for its evidence, see The Hearing Officer's Guide:

> *The tape recording must be properly authenticated before its receipt into evidence. Proper authentication requires, in part, proof of chain of custody, further, an explanation of any editing must be provided by someone with knowledge of editing.*

NLRB Hearing Officer's Guide at 150-151 (quoting *Medite of New Mexico Inc.*, 314 NLRB 1145, fn. 7 (1994).

The witness the GC attempted to use to "authenticate" the recording – Jonathan Matthew Brewer – apparently was not even present for the meeting purportedly recorded. The GC argued at the hearing that *East Belden Corp.*, 239 NLRB 776 (1978) and *H&M International Transp.*, 363 NLRB No. 139 (2016) stand for the proposition that an employee who was present when a recording was made can authenticate that recording even if they did not make it themselves. (Tr. 101:15-102:15.) After playing the recording, the GC asked Mr. Brewer if the contents of the recording reflected the meeting that he was in. (Tr. 140:22-25.)

Even though Mr. Brewer said "yes," *i.e.* that the recording he just heard accurately represented the contents of the meeting he was in, both the GC and Mr. Brewer must have known that Mr. Brewer did *not* attend that meeting. We know this because, as the Respondent would learn the next day when the GC turned over Mr. Brewer's *Jencks* materials, the meeting that Mr. Brewer described to the GC in his affidavit contained entire topics that were clearly nowhere to be found in the recording that the GC played. (Tr. 161:23-162:15.) Thus, either the recording was edited or Mr. Brewer was not there when it was made. Under cross-examination, Brewer admitted that he [Brewer] was not at the recorded meeting. (Tr. 162:4-18.)

Regardless, it is clear that the decisions the GC cites, *East Belden* and *H&M*, are not applicable. In *East Belden*, to authenticate a recording, the GC called as witnesses both the employee who made the recording and another employee who was present when the recording was made. *Id.* at 782. In *H&M*, the person who made the recording was not a witness, but the GC presented evidence regarding who made the recording, *evidence establishing a chain of custody from the person who made the recording to the GC*, and elicited testimony from other witnesses who were in fact at the recorded meeting, which corroborated the veracity of the recording. *Id.* at n 17. In the instant case, the GC refuses to identify who allegedly made the recording, has failed/refused to establish any chain of custody between the creator and the GC, and has failed to call any witness who was actually at the meeting purportedly recorded. Neither the GC nor the Respondent has located any authority suggesting it would be proper to admit GC 6 with such a total absence of foundation.

The evidence necessary to authenticate this recording, to the extent it exists, is known only to the GC. The burden of producing this evidence, *i.e.* authenticating the recording, was on the GC. Because the burden of producing this evidence rests squarely on the GC and because this evidence is peculiarly within the control of the GC, the only proper course is to draw an adverse inference that the GC failed to authenticate the recording because the GC could not authenticate the recording by calling the witness who made the recording. See *NLRB Division of Judges Bench Book at §16-611.5 Failure to Call Witness: Adverse Inference*. Therefore, the recording is not admissible, and GC 6 must be rejected.

Even if the recording in question was admissible, which is denied, it merely contains additional "generalized expressions of [Brawner's] desire to make things better," and as such, does not violate the Act.

### vi. Even if Brawner Solicited Grievances, Which is Denied, the Solicitation of Grievances Does Not Violate the Act Where the Employer has a Past Practice of Soliciting Grievances

Even if Brawner's request to "give [him] 12 months" could be viewed as solicitation of grievances, which is denied, the mere solicitation of grievances is not unlawful where the employer has an established pattern of soliciting grievances from employees. The Board has repeatedly held that "[a]n employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign." *Naomi Knitting Plant*, 328 NLRB 1279 (1999), citing *House of Raeford Farms*, 308 NLRB 568, 569 (1992); *TNT Logistics North America, Inc*., 345 NLRB 290 (2005) (holding that the employer did not violate Act by asking an employee "What would make things better?" where employer had an "established practice of soliciting employee concerns, a practice it had followed before the Union arrived on the scene," including by promulgating an open door policy); *Johnson Technologies, Inc*., 345 NLRB 762, 764 (2005) ("It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign"); *Wal-Mart Stores, Inc.,* 339 NLRB 1187, 1187 (2003) (no violation where employer with past practice of soliciting employee grievances brought in additional district and regional managers who solicited grievances from employees, noting "an employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign"); *Wal-Mart Stores, Inc*., 340 NLRB 637, 640 (2003) ("It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign."); *Curwood, Inc*., 339 NLRB 1137 (2003), affd. in part, vacated in part 397 F.3d 548 (7th Cir. 2005) (employer's continued practice of allowing employee questions did not violate the Act); *MacDonald Machinery Co.,* 335 NLRB 319 (2001) (no unlawful solicitation of grievances where "the Employer undertook to

solicit employee grievances prior to the onset of the union campaign."); *PYA/Monarch, Inc.*, 275 NLRB 1194 (1985)(Regional Vice President did not unlawfully solicit grievances when he told employees that the employer's door was always open to hear any complaints, where employer had an open-door policy prior to the outset of union organizing campaign).[37]

Sysco Columbia whereby it solicits employee concerns, all of which were in place before the union campaign at Sysco Columbia. Specifically:

- Sysco Columbia has a policy entitled "Open-door Philosophy" that provides in part:

> Sysco Columbia places great importance on maintaining good relations with its employees and recognizes that satisfied employees and successful operations go hand in hand. Problems and misunderstandings arise occasionally in every business and every job. It is important to you and to the Company that you have an opportunity for a full discussion and consideration of your concerns. Should you have a suggestion as to ways to improve the Company, or should a problem arise, feel free to openly discuss it with management. With the Open-Door Policy of Sysco Columbia, all employee concerns shall be given full consideration.
>
> We believe that any problem, whether large or small, can best be resolved by open and direct discussion….
>
> …
>
> The door is always open. Remember, the company can only address concerns of which the company is made aware.

(R. Ex. 40.)

- Transportation Director Bo Nash, upon arriving at Sysco Columbia, implemented a "Fix One Thing" philosophy, which he had previously followed at Sysco Cleveland. (Tr.

[37] It is not material whether the employer's past practice of receiving employee complaints was employee-driven or employer-driven. In *MacDonald Machinery*, the Board noted it was not "critical" that before the campaign, employees approached the employer about problems and the employer only began approaching the employees to solicit grievances after the campaign began. 335 NLRB at 320. The Board noted: "The significant point is that, both prior to the onset of the union campaign and after, the Employer was willing to listen to the complaints of its employees and to respond to them." *Id*.; see also *Johnson Technology, Inc*., 345 NLRB 762 (2005) (fact that prior solicitations may have been employee-initiated, rather than employer-initiated, was not sufficient to establish a violation of the Act).

887:10-18.) He implemented the philosophy about two weeks after he arrived at Sysco Columbia in June 2015. (Tr. 894-95.) According to Nash:

> Fix one thing means give me something every day that you feel needs to be fixed to help you do your job efficiently. So I'm going to fix something every day. I'd rather fix something that's going to mean something to somebody.

(Tr. 887:6-9)

According to GC witness Johnathan Brewer:

> [S]ince [Nash] got there, his whole concept has been let's fix one thing today. And not only has he left voice mails about it, he's sent through emails through our tablets that we have in our trucks. And it's, hey, if you've got something that needs to be fixed, send it up the ladder and we'll try our best to get it taken care of.

(Tr. 170:24-171:5.)

Pursuant to the "Fix One Thing" program, Nash has received dozens of complaints from drivers regarding aspects of their working conditions. Nash estimated he had received around forty-five (45) "fix one thing" suggestions from his arrival in July 2015 to the date of trial. (Tr. 886:7-8, 911:4-13.) Nash regularly adjusts those grievances and solicits further input from employees. Many of the complaints received through the "Fix One Thing" process impact drivers' terms and conditions of employment. For example:

- Around April 14, 2016, Nash received several complaints from employees, which he either addressed himself or delegated to supervisors. (Tr. 901:16-22; R. Ex. 15.) Christopher Stroman raised an issue with communications, and Nash responded by asking what communications would help Stroman. (R. Ex. 15.) Marshall Williams noted an issue with loads, wanting additional space on his truck to work. (Tr. 903:9-23; R. Ex.15.) In response, Williams asked supervisor Ashley Buster to tell Williams about Sysco Columbia's Load Condition Hotline. (Tr. 904:21-905:7; R. Ex. 15.)[38] In response to a concern raised by an employee named Beckler, Nash asked supervisor Larry Malloy to meet with Beckler about reclassifying stops, which has a direct impact on employee pay. (Tr. 904:6-20; R. Ex. 15.) In response to a concern raised by Kyle Hughes, Nash asked supervisor Chris Siroky to explain

[38] As Nash noted, the condition of a driver's load could impact their terms and conditions of employment because if the load is not proper, it can impact their effective rate of pay. (Tr. 905:3-7.)

to Hughes how orders are picked in the warehouse. (Tr. 905:8-25; R. Ex.15.)[39] Finally, in response to a routing concern raised by Mark Richardson, Nash asked "Pat" to meet with Richardson regarding his routing issue. (Tr. 906:1-7; R. Ex. 15.) After delegating these tasks, Nash told the supervisors and routers: "We fixed several things today. Let's build on it." (Tr. 906:13-17; R. Ex. 15.)

- On September 1, 2016, Nash received a message from driver Christopher Usher (who used the term "fix one thing") requesting that his route be changed by adjusting the planned delivery window for a particular customer and by moving one of his stops to the end of his route "so I [can] get compensated for the added miles and time…." (R. Ex. 11.)

- On or around September 30, 2016, Nash received a complaint from driver Kelly Donald about a long delay on one of his stops. (R. Ex. 14). As Nash testified, long stops negatively impact drivers' effective rate of pay. (Tr. 898:3-12, 899:13-24.) Mike Turner explained that a driver's effective rate is the total dollar amount earned by the driver divided by the time it takes the driver to perform his duties. (Tr. 981:8-12.)

- On or around September 30, 2016, Nash received a complaint from driver Brett Lancaster about his lack of productivity on his route (specifically, Lancaster complained that he had only delivered 27 pieces in a three-and-a-half hour period). (R. Ex. 13.) As noted above, low productivity causes drivers to have to work longer, which negatively impacts their effective rate of pay. (Tr. 898:3-12.)

- On October 4, 2016, Nash received a complaint from Kyle Hughes (one of the GC's witnesses) about the safety of one of his stops. (R. Ex. 10). Hughes specifically complained that the size of the delivery and fatigue caused by taking the delivery downstairs to the customer's basement. (Tr. 892:10-14.) In response to this complaint, Nash asked supervisor Brooks Williams to send a supervisor with the next delivery to that stop, so they could evaluate whether Sysco Columbia needed to send a special delivery driver to help with that stop. (R. Ex.10; Tr. 892:15-18.)

- On December 16, 2016, Nash received a complaint from a driver, Kelley Donald, about routing. (R. Ex. 12.) Specifically, Donald complained about waiting an hour and a half for a customer's location to open. (Tr. 895:22-896:1.) Donald also wanted notes added to the driver manifest showing where to deliver the account. (*Id.*) Finally, Donald complained about a stop he felt was out of the way. (Tr. 896:13-20.) In response, Nash asked Patrick Brown whether a particular stop could be put on a standard route closer to its location. (R. Ex. 12; Tr. 896:21-23.)

[39] How orders are picked impacts drivers' terms and conditions of employment, because if they have to look for product on the pallet, it could affect their effective rate of pay. (Tr. 905:22-25.) After receiving direction from Nash, Siroky walked Hughes through the warehouse to show him how orders are selected at nights, explaining "how pick paths works for the selectors and how common errors can occur at nights with selectors." (R. Ex. 15.) Hughes was able to speak with two other employees "so they could elaborate on his concerns from earlier." (*Id.*) Siroky believed "[t]his answered a lot of [Hughes'] questions." (*Id.*)

- On January 27, 2017, Nash received a complaint from driver Jeff Nash about his load, specifically about "splits" and boxes of product that would not scan. (R. Ex. 9.) These issues affect a driver's efficiency, which directly impacts the driver's effective rate of pay. (Tr. 907:13-23.)

- Sysco Columbia implemented a Positive Associate Relations (PAR) program in fall 2016, before the start of any union organizing, pursuant to which Sysco Columbia management or HR personnel holds short conversations with non-supervisory employees about their workplace concerns, and maintains a record of any actionable items that arise out of those conversations "so that we—make sure that we have a plan in place to get those issues addressed." (Tr. 1182:7-1184:12.) Examples of the concerns raised through this process – many of which were remedied by Sysco Columbia – include:

  - Brent Boulware complained to Nash about being scheduled to work on Saturday.
  - Eric Richardson complained about not being on the correct route.
  - Harold Floyd complained to Nash about a stop classification.
  - Matt Pavlick complained to Bo Nash that his truck had been loaded out of order, resulting in him being unable to get to some of his dry product. He asked for a warehouse employee to help him unload the truck.
  - Richie Gruber complained about receiving work-related texts.
  - Patrick Windham complained about his STS unit not working.
  - Mike Beckler complained about load conditions and the lack of straps on pallets in the yards.
  - Randy Johnson complained about waiting for an hour at a customer location.
  - An employee named "Dodson" requested a specific route.
  - An employee named "Joyce" complained to Kema Weldon about benefits and the Company's compensation plan.

  (R. Ex. 41.)

The PAR program involves communications that are initiated by employees, as well as communications initiated by supervisors (Tr. 1185:20-26.) The spreadsheet is stored on a shared drive for supervisors and HR. (Tr. 1187:3-9.)

- Sysco Columbia has a "load condition hotline" whereby drivers can lodge complaints about the conditions of their loads, which impacts their pay. (Tr. 904:21-905:2.)
- Sysco Columbia maintains an "Ethics Hotline" for employees to raise issues. (Tr. 1182:3-10; *see also* R. Ex. 40.)

As the foregoing shows, Sysco Columbia maintains numerous avenues whereby it solicits and receives grievances from employees. Accordingly, even if Brawner's vague comments could be regarded as a solicitation of grievances, such comments do not violate the Act.

### E. Jim Fix Did Not Violate the Act

The General Counsel alleges that Jim Fix was a Section 2(11) supervisor and Section 2(13) agent of Sysco Columbia at all material times since March 27, 2017 (the period of the IBT organizing effort for the mechanics). (Complaint, ¶6(c)(i).) The General Counsel also alleges that Fix violated the Act in April 2017 by: (1) telling employees in his office that the Company would grant them wage increases sooner if they voted against union representation; (2) in the break room, (a) soliciting employees' complaints and grievances, promising employees increased benefits and improved terms and conditions of employment if employees rejected the union, (b) blaming the union for employees not getting wage increases by telling employees that the Company's "hands were tied" because of the union, and (c) granting benefits to employees by allowing employees to start parking closer to their work areas. Finally, the GC alleges that, on the shop floor, Fix (a) interrogated employees about the impact of the Company's promises to gauge employee's support for the union, (b) suggested that employees rescind the election process, and (c) threatened that if

the union were voted in, the Company's "hands would be tied" and employees' pay would be frozen. These claims are factually and legally baseless.

### i. Fix was not a 2(11) supervisor or 2(13) agent during the time in question

The Board has long held that the General Counsel has the burden of proving, by a preponderance of the evidence, the supervisory or agency status of an individual in order to hold an employer responsible for the actions of that individual. Because the General Counsel has not met its burden in this case, its allegations against Fix must be dismissed.

Under the NLRA Section 2(11), an individual is a supervisor "if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., 'assign' and 'responsibly to direct') listed in Section 2(11); (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;' and (3) their authority is held 'in the interest of the employer'". *Oakwood Healthcare, Inc.*, 348 NLRB. 686, 687 (2006). The burden of proving supervisory status "rests on the party asserting that such status exists." *Dean & Deluca New York Inc.*, 338 NLRB 1046, 1047 (2003). Further, the asserting party must "establish it by a preponderance of the evidence." *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) (citing *Dean & Deluca*, 338 NLRB at 1047*).*

Here, the General Counsel has failed to satisfy its burden to establish that Jim Fix held or exercised the authority of a 2(11) supervisor in April 2018, when he allegedly violated the Act. The following is compelling proof:

### ii. Fix's testimony regarding his lack of supervisor authority was credible and supported by all but one GC witness

#### a. <u>Jim Fix's testimony</u>

Jim Fix's testimony concerning his lack of 2(11) authority during April 2017 was credibly supported by virtually every witness presented by either party in this case. As Fix explained, he

was a Master Tech in the Maintenance Department, working alongside the other mechanics for 13 years prior to the Teamsters' March 30, 2017 petition to represent the mechanics. (Tr. 1127-1128, 1141:16-20.) He was in the unit sought to be represented by the union when the petition was filed (Tr. 1129:14-16.)

Fix responded to a job posting for a Mechanic Supervisor position that would be vacated when the existing supervisor, Randall Drafts, retired in May 2017. (Tr. 1128:17-25.) Fix was offered and accepted the position to replace Randall on or about March 27, 2017. (CG. Ex. 22.) However, Fix did not have or exercise the authority of the Mechanics Supervisor position until Randall Drafts retired on May 11, 2017. (Tr. 1132:6-12.)

Between March 27 and May 11, 2017, Fix was merely training for the Mechanics Supervisor position. (Tr. 1131:24-25.) As Fix explained, "Randall continued doing his job. He was the supervisor. I basically was shadowing him and being trained, trained on the computers and – and all that stuff on his position and what it entitled." (Tr. 1132:6-12.) At the same time, Fix was also learning the SAP computer system[40] used and the functions performed by the Maintenance Coordinator (Kiko) because Kiko was also retiring at the same time as Drafts (Tr. 1135:18-25, 1136:1-6.) As Fix explained to Judge Sandron,, he was learning the maintenance coordinator functions so that he could help train the person who would fill that position (Tr. 1136:18-21.)[41]

Fix further explained to Judge Sandron that during this period of time he did not have authority of any kind over regular mechanics. (Tr. 1139:20-24.) "I was shadowing Randall. He held the responsibility. I was just in training." *Id*. Fix did not discipline a spotter or mechanic; he was not responsible for directing their work. (Tr. 114:2-9.) "I basically looked over Randall's

[40] The SAP parts inventory system is also used by mechanics (Tr. 1138, 5-12).
[41] The Maintenance Coordinator position reports to the Maintenance Supervisor (J. Ex.1).

shoulder and see how he ran it." (Tr. 114:8-10.) While in training, Fix also continued to wear his mechanic uniform (Tr. 1140:22-25, 1141:1-4.)

**b. Mike Turner's Testimony Was Compelling and Supportive of Fix**

Fix's testimony regarding his duties during the period in question were supported by the testimony of Mike Turner, Vice President of Operations. (Tr. 928:15-9:30:6, 930:10-21, 931:11-19, 11:32:6-12, 1135:20-22.) Turner, who made the decision to promote Fix, was familiar with his activities and responsibilities during the period from March to May 2017. (Tr. 925:11-18, 9:30:6-9.) As Turner testified, Fix did not immediately assume all of the responsibilities posted for his job description (Tr. 928:15-24; R. Ex. 16.) "We wanted to get him some training so he could learn, because there's a lot of systems out there that he was unfamiliar with, and unfortunately, we were losing at the same time, our clerk." (Tr. 925:21-24.)

During the period from March to May, Turner testified that Fix did not have the authority of a 2(11) supervisor (e.g., to hire or fire employees, to lay off or discipline employees, etc.). (Tr. 930:6-25.) As to the direction of work of the spotters, Turner stated "they was pretty much self-sufficient." (Tr. 22-25). Randal Drafts was still there during this period, and "he was doing the job that he – as supervisor, as he always had done." (Tr. 931:11-16). Randall Drafts and Dwayne McCloud, Maintenance Manager, were responsible for training Fix. (Tr. 931:21-25). "We wanted him to become familiar with how we purchase parts, become familiar with the Vendors, and become familiar with the PO [Purchase Order process]. They - - that department, all the purchase orders that we purchase from, even the facility side and the warehousing side and the transportation side and the fleet side, all the purchase orders went through that department for preparation to be paid." (Tr. 932:15-21.)

### c. The GC's Own Witness Did Not Perceive Fix as a 2(11) Supervisor

Moreover, virtually every witness of the General Counsel (2 of 3) who was questioned about Fix's just duties during April 2017 supported Fix's testimony. For example, Robert Anderson, a mechanic, testified that in April 2017 Fix was a "supervisor in training," learning the job of fleet supervisor (*See* Tr. 464:14-15, 20-21.) Fix was learning the computer systems. Learning the administrative side, more than anything, else." (Tr. 464, 22-25; 465, 1-4). Similarly, Chris Bookert, a mechanic, testified that he did not think that Fix was a supervisor while Drafts was still there; he transitioned into that role after Drafts retired. (Tr. 4282-11; 429, 2-5).

### d. Board Precedent Supports that Fix Was and Is Not a 2(11) Supervisor

The Board has held that "supervisors in training," like Fix in this case, are not 2(11) supervisors under the Act. *See Bredero Shaw*, 345 NLRB 782 (2005). In *Bredero*, the Board found that Wiley, a "supervisor in training," was not a 2(11) supervisor as defined by the Act. *Id*. at 785. Wiley was hired as an electrician lead, and was told that he would eventually replace his supervisor once construction of the "quad rack area" had been completed. *Id*. Wiley was told by his supervisor that he was a "supervisor in training," and he was allowed to tell employees what to do, as identified by his supervisor. *Id*. In concluding that Wiley was not a 2(11) supervisor, the Board found that Wiley did not exercise independent discretion over assignments or preparation of the work schedule. *Id*. Thus, the Board looked at the 2(11) analysis of independent judgment when determining whether a supervisor in training was a supervisor under the Act. The Board's determination in *Bredero* is equally valid here as Fix was merely training to replace his supervisor upon retirement and was merely learning the requirements of the position. He did not have or exercise the authority and independent discretion of a 2(11) supervisor.

### iii. The Record Evidence Established that Fix Did Not Act as an "Agent" of the Company in any Alleged Discussions with Mechanics About the Teamsters Organizing Effort

The standard for proving agency status under Section 2(13) of the Act is the same as the common law analysis. *Ready Mix Inc.*, 337 NLRB 1189 (2002). "[T]he burden is on the party asserting agency status to prove such status, by offering specific evidence in its support". *Arden Post Acute Rehab*, 365 NLRB No. 109 (July 25, 2017). Furthermore to find that apparent authority exists it must manifest in such a way that it "creates a reasonable basis for the [third party] to believe that the principal had authorized the alleged agent to perform the acts in question." *Southern Bag Corp*., 315 NLRB 725 (1994). Here the General Counsel has presented insufficient evidence to show that mechanics and spotters had a reasonable basis to believe that Sysco Columbia has authorized Fix to perform the alleged unlawful acts in question, particularly any discussions he allegedly had with mechanics or spotters about the Teamsters organizing effort or their wages.

Indeed, there is no evidence that Fix acted as an agent of the company in any discussions or actions that he had with other employees that were in any way related to the Teamsters organizing efforts directed at the mechanics.[42] As Fix testified, after March 27, 2017, he did not conduct any meetings with mechanics to discuss the union organizing effort. (Tr. 1142:22-25.) He never attended any management meetings about the union. (Tr. 1143:19-22). Further, the company never asked Fix or directed Fix to communicate anything to the spotters and mechanics about the union. (Tr. 1143:13-18.)

Moreover, as other witnesses testified, members of management who were leading the group meetings about the union stood at the front, facing the employees; Fix sat with the

[42] Of course, the mechanics election was separate from the driver election and Fix had no involvement with the drivers or their meetings.

employees. (Tr. 840:12-841:3). Fix had no role as a communicator (Tr. 1144:4-6.) Further, as Fix explained to Judge Sandron, his only role at those meetings was being a mechanic. (Tr. 1144:7-14.) Therefore, he was never held out to employees as an agent of the Company for such purposes. Like the "field representatives" in *Ready Mix, Inc*., 337 NRLB 1189 (2002), Fix was neither cloaked with 2(11) authority or received as having that authority. There was no showing that Sysco Columbia placed Fix in a position that employees would reasonably believe that he was acting for management, nor was there evidence that Fix was held out as a conduit for transmitting information from management to employees. Accordingly, the allegations pertaining to Fix should be denied. *Id.*

**iv. Even if Fix was a "Supervisor" or "Agent " of Sysco Columbia, the General Counsel has Failed to Prove that Fix Violated the Act**

**a. The General Counsel's Cannot Satisfy Its Legal Burden**

In order to prove a Section 8(a)(1) violation, the General Counsel must establish that the employer engaged in conduct that would reasonably tend to restrain, coerce or interfere with employees' rights under the Act. *Webasto Sunroofs Inc.*, 342 NLRB 1222, 1223 (2004) *citing Am. Freightways Co.*, 124 NLRB 146, 147 (1959). The General Counsel must prove this by a preponderance of the evidence. *Cheyney Constr. Inc.*, 344 NLRB 238, 239 (2005) (finding no violation of the Act because the objective facts did not prove a violation by a preponderance of the evidence); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995) ("[I]t is well established that the test of interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act."). Even if the General Counsel could prove that Fix was a 2(11) supervisor or acting as an 2(13) agent of the Company, the General Counsel clearly failed to present any credible evidence to establish that Fix committed a single violation of the Act.

### b. Fix credibly denied alleged unlawful acts

Contrary to the General Counsel's allegations, Fix never encouraged the spotters or mechanics to rescind the petition for representation filed by the Teamsters (Tr. 1143:1-4); he never promised spotters or mechanics any increase in wages if they rejected the union. (Tr. 1143:5-8.) Nor did Fix tell employees that the Company would grant them a wage increase sooner if they voted against the union. (Tr. 1146, 9-13), blame the union for employees not getting a wage increase (Tr. 1147:12-14), or tell employees that the Company's hands were tied because of the union. (Tr. 1147:15-17.)[43]

Fix testified that he never asked employees about their grievances following the union's petition. (Tr. 1146:21-25; 1147:1-11.) Fix was frank and direct: "I knew that from before. I mean, I already knew what their grievances and gripes were because I was part of being a mechanic back then before I got in this position. So I know what everything was because I know all of these fellas. I worked with them." (Tr. 1146:23-25; 1147:1-2.) Fix also testified that he never asked employees how they intended to vote in the election. (Tr. 1161:11-15.)

### c. The GC's witnesses were not credible

As discussed above, virtually every General Counsel witness who was questioned about Fix's job duties and actions during April 2017, supported Fix's own testimony that he was not a supervisor, just learning the position. Further, those presented to establish Fix's alleged promise of a wage increase or interrogated them either ultimately denied that Fix promised anything, described casual conversations on topics similar to what they had with Fix before he was a supervisor in training, or were not credible.

[43] The absurdity of the allegations is compounded by the proximity in time of these alleged acts to Fix's promotion from a mechanic to supervisor in training and the uncontested fact that Fix has no authority or experience in establishing wages and that there was no wage increase to which employees had been denied.

### 1. Robert Anderson

Indeed, the alleged promise of a wage increase was premised upon Robert Anderson's false testimony and a fabricated exhibit. Robert Anderson, a mechanic and the General Counsel's witness, testified that Fix showed him wage data for mechanics at another Sysco location and promised to get the mechanics a wage increase. (Tr. 466:1-25, 477:12-25, 478:4-24; GC Ex. 11.) Further, Anderson testified under oath that GC Exhibit 11 was the wage data that Fix showed him and that Fix allowed Anderson to take a picture of the data on his phone. *Id*. However, the exhibit was fabricated and Anderson's testimony was false.

Fix readily acknowledged showing Anderson wages and scales for Sysco Columbia but denied that GC Ex. 11 was what was shown to Anderson. (Tr. 1144:15-24) Fix explained that the document shown to Anderson had a pay spread from the time you start as a beginning mechanic, like a lube mechanic, all the way up to master tech. (Tr. 1150:14-18.) But Fix denied allowing Anderson to take any pictures of the wage scales that were shown (Tr. 1144:25-1145:2, 1151:16-18.)

After investigation, the Company was able to identify GC. Ex 11 as a wage scale and progression contained in a collective bargaining agreement between the Teamsters and another company located in Riverside, California. (Tr. 805:4-24.) Neither Sysco Columbia nor Fix had access to that collective bargaining agreement. (Tr. 1144:15-1145:2, 1149:12-1151:13.)

### 2. Carlos Nuttry

Similarly, the General Counsel presented Spotter Carlos Nuttry to testify regarding statements allegedly made in during group meetings with the mechanics and spotters about the union. However, Nuttry testified that he could not remember who started a meeting because "at the time I actually started tuning some things out, tuning some of that stuff out." (Tr. 375:6-10.)

His recollection of what was stated at the meetings was scattered and confusing. (Tr. 375:19-25, 376:1-6.) When asked who actually spoke on the scattered subjects, Nuttry responded, "I just can't really remember who actually said." Also, when questioned about a conversation with Mike Brawner, he again provided a scattered response and acknowledged, "I started to tune out a lot of stuff." (Tr. 380:4-11.) Nuttry claimed that Fix spoke with him and other spotters about any problems bothering them. (Tr. 382:13-17.) However, his testimony of what was said was, again scattered and confusing. "We basically sat down and we just started discussing random things of issues and, you know, topics and things of that nature." (Tr. 384:1-3.) Under cross-examination concerning his Board affidavit, Nuttry admitted that he had discussions with Fix about the union, before Fix was promoted, because Fix was involved in the union effort. (Tr. 394:1-12.) Nuttry, could not recall whether Randal Drafts had retired when Fix had discussions with the spotters (Tr. 395:1-25, 396:1-4.) Nuttry also admitted that the group meeting the spotters had with Fix was not premised upon the union activity. (Tr. 397:2-4.) Finally, Nuttry's discussion of Fix's responsibilities and activities after his promotion was conclusory, directed, lacking foundation and void of factual specifics to evince any supervisory authority requiring independent discretion. (Tr. 406:1-407:25, 409:1-16.)

### 3. Chris Bookert

Chris Bookert, a General Counsel witness who worked as a fleet mechanic in Sysco Columbia for 6 ½ years, was the lone exception. (Tr. 411: 8-18.) Bookert did not think that Fix was a supervisor when Randall Drafts was still there (Tr. 428: 1-11, 429:1-5.) Fix did not transition into the supervisor role until Drafts retired. He said that he had a one-on-one discussion with Fix about the technicians' pay scale, and how he felt they were underpaid based upon their grade as a technician (Tr. 417:6-14, 418:1-12.) However, he acknowledged that he had discussions with Fix

about pay, both before and after Fix became a supervisor. (Tr. 431:3-18.) Contrary to Nuttry, Bookert testified that the approval to park in the back occurred before Fix transitioned to supervisor. (Tr. 424:1-9.) He acknowledged that, after the change, their walk was comparable to the distance warehouse employees walked to their work areas. (Tr. 433:1-5.) Finally, when questions about his Board affidavit, Bookert testified that Fix mentored him, and his discussions with Fix were more from a personal friendship standpoint than a supervisory standpoint. (Tr. 435:10-17; R. Ex 3.)

By contrast, Fix and the witnesses presented by the Company on the claims against Fix were forthright and specific in their testimony. Josh Powell, who was hired at Sysco Columbia as a spotter and has worked as a Tech II Journeyman, testified that he had discussions with Fix and others about the union and mechanics' prior to Fix being promoted. (Tr. 1168:14-18, 1169:1-5, 23-25, 1170:1-3.) However, Powell did not have any discussions of that nature with Fix after his promotion. (Tr. 1170:4-7.) In fact, Powell explained to Judge Sandron that, after Fix was promoted to supervisor, he had no discussions with Fix about the union, wages, benefits or working conditions. (Tr. 1173:1-10, 12-14, 1174:1-3.) Further, Powell testified that in April 2017, he was not expecting any type of wage or benefits change. (Tr. 1174:15-17.) He also testified that he never complained to Fix about the location of the parking, and when Fix communicated that they could park in the back, Fix never referenced the union at all. (Tr. 1175:6-10.) Finally, Powell testified that he was never asked by anyone in management or Fix regarding how he would vote in the election. (Tr. 1176:5-10.)

**v. "Hands are Tied" Remarks are Not Unlawful**

While Fix denied making any comments that his hands are tied, such comments are not legally sufficient to establish a violation of the Act, particularly given Fix's position and the context in which the comments were allegedly made. In *Ed Taussig, Inc.*, 108 NLRB 470 (1954),

the Board affirmed the ALJ's finding that remarks made, including "my hands are tied at this time" did not have a coercive or restraining effect on the employees, and thus, were not a violation of the law. The Manager of the Service Department was thanking employees for a Christmas gift that he had received, at which time an employee asked about raises. The manager of the service department stated "Well, Ralph, my hands are tied at this time. I am not in a position to give you a raise or do anything. There is an election on and if I give you a raise it may look like I am trying to influence you one way or another." *Id*. at *489.

Here, Fix was not a supervisor; he was not involved in the company's communications concerning the union, and neither he nor his supervisor (who he was being trained to replace), had any involvement in the establishment of wage rates for mechanics or spotters. (Tr. 831:13-15, 928:19-24, 936:11-14, 19-25, 978:15-20, 1132:9-12.) Therefore, any alleged remarks made by Fix made concerning matters with which he had no involvement or experience cannot establish a violation of the Act. Cf., *Amcast Automotive*, 348 NLRB 836 (2006) (supervisor's comments about a discharge decision in which he had no involvement is insufficient to establish employer's animus).

Moreover, Fix had worked along the mechanics for 13 years; they were aware that he was training for a new position, and there is no evidence of suggestion that any of the alleged discussion were made in a threatening tone or that the remarks were objectively threatening or intimidating in any way. This is precisely the context in which the Board has recognized in *Rossmore House*, 269 NLRB 1176 (1981) and its progeny the significant latitude that must be given to workplace discussions, particularly among former peers. Factors such as the background of the relationship, nature of the statement, identity of the person making the statement, and the place and method of statement should be considered. *Id.* Considering these factors in this case, where Fix was just

promoted to supervisor in training after working alongside the mechanics and spotters for 13 years and where they had previously discussed their mutual issues and concerns (prior to Fix's promotion), the alleged remarks are factually and legally insufficient to establish a violation of the Act.

### vi. Fix Did Not Confer an Unlawful Benefit By Allowing Employees to Park Closer to the Shop

Notwithstanding Fix's testimony denying the above alleged acts, Fix readily admitted to allowing employees, at some point, to start parking closer to the maintenance shop. (Tr. 1147:18-20.) As Fix explained, "we'd been talking about it for a long time, but…I had asked, and they said it wouldn't be a problem. So we just started parking back there." (Tr. 1147:23-25.) Fix testified, however, that this occurred in March, not in April as alleged. The petition for election involving the unit of mechanics and spotters was not even filed until March 29, 2017. Therefore, the record evidence is insufficient to even establish, by a preponderance of the evidence that the change occurred in the critical period, after the petition. Accordingly, the allegation should be dismissed.

Even if the change in parking occurred during the critical period after the filing of the petition involving the mechanics, the change is factually and legally insufficient to be deemed the conferral of a benefit. First, the change in parking was not unprecedented or made in response to an employee complaint. (Tr. 1148:17-20; 1149:3-5.)[44] As Fix testified, "I just told them they could start parking in the back along the fence line like we previously had talked about before. We had done it for a while and then quit." (Tr. 1149:3-5.)

Second, the change did not provide the mechanics and spotters with any parking advantage or benefit over other employees. Virtually every witness who was questioned about the net change

[44] Indeed. One of the General Counsel's witnesses testified that he parked in the back before Fix said anything to him, particularly on rainy days. (Tr. 432:1-8.)

in distance acknowledged that the mechanics and spotters still walk farther to get to the shop from the new parking area along the back fence than the distance drivers and other employees walk from the front parking lot to their work areas or that the distances are comparable.[45]. Indeed, Fix measured the distance between the front parking lot to the warehouse at 150 feet. (Tr. 1160:16-21.) Fix measured the distance from where the mechanics and spotters are now parking along the back fence to the shop at 260 feet. (Tr. 1160:22-25.)

Finally, the Board has recognized that a mere change in parking is legally insufficient to establish an unlawful unilateral change in terms and conditions of employment under the Act. In *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005), the employer unilaterally changed the location where employees were allowed to park their cars. Employees had been parking their cars in a lot that was about a 1-minute walk from the facility. Then, the employer unilaterally decided to move employee parking to a different parking lot that was a three to five minute walk from the facility.

The Board ruled, "the relevant inquiry is not employee preference, but whether the change properly can be characterized as 'material, substantial, and significant.' Here we do not find that the difference between a 1-minute walk and a 3 to 5-minute walk from the parking lot to the entrance is a sufficiently significant difference to warrant imposing a bargaining obligation…At most, such an increase in walking time is a relatively minor inconvenience to the employees, not a statutorily cognizable change in their terms and conditions of employment." *Id.* at 220.

The Board's reasoning in *Berkshire Nursing* is equally compelling here. The change in parking here was more convenient for the spotters and mechanics but still not as favorably located as the parking available to other employees (vis- a-vis their work areas). Moreover, the change in

[45] GC witness Nuttry acknowledged that that the walking distance to the mechanic shop is comparable to where employee walk to the warehouse (Tr. 403:1-2, 420:23-25).

location here was also less "material, substantial and significant" than the change of parking in *Berkshire*.

## VI. CONCLUSION

Considering the credible evidence of record and the above facts and authorities, the GC has clearly failed to meet its burden of to establish, by a preponderance of the evidence, any violation of the Act. Accordingly, the Complaint should be dismissed in its entirety.

Respectfully submitted this 20th day of July, 2018,

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